80-532

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CULPEPPER, BEATTY & TURNER
Post Office Box 10261
500 Lewis State Bank Bldg.
Tallahassee, FL 32302
(904) 222-4945

Counsel for Petitioners

M. STEPHEN TURNER

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QUESTION PRESENTED FOR REVIEW

Whether by agreeing to abide by federal laws and regulations applicable to the Medicaid program, Florida waived its Eleventh Amendment immunity from suit in federal court for retroactive damages sought by Medicaid providers because Florida complied with a federal regulation later declared in violation of federal statute.

PARTIES TO THE PROCEEDING

Petitioners are the State of Florida Department of Health and Rehabilitative Services and its Secretary, A. J. Taylor, substituted for William Page, Jr.

Respondents are the Florida Nursing Home Association, individual nursing homes located in the Southern District of Florida,[1] and Patricia Roberts Harris, as Secretary of the U.S. Department of Health and Human Services, formerly the Department of Health, Education and Welfare (HEW).

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 616 F.2d 1355 (5th Cir. 1980), and its text is reproduced in Appendix I. The Order denying Petition for Rehearing is reproduced in Appendix II.

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[1] For a listing of these individual facilities, see Petition for Certiorari in A. J. Taylor v. Golden Isles Convalescent Center, Inc., Case No. 80-85, now pending in this Court, at pp. i-ii.

The Fifth Circuit Opinion dealt with consolidated cases. The Golden Isles case concerned jurisdiction and venue in suits against states and is the subject of Petition for Certiorari in Case No. 80-85. This proceeding seeks review of the Florida Nursing Home Association case concerning Eleventh Amendment immunity.

The opinion below reversed the Order of the U.S. District Court for the Southern District of Florida granting summary judgment in favor of the State on the claim by the nursing home plaintiffs for retroactive benefits. The District Court held such claim was barred in federal court by the Eleventh Amendment. The District Court's Memorandum Opinion and Order is reproduced in Appendix III.

JURISDICTION

The Opinion the Fifth Circuit Court of Appeals sought to be reviewed was entered on May 6, 1980. Timely petition for rehearing was denied on July 22, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the states by citizens of another state or by citizens or subjects of any foreign state.

42 U.S.C. sec. 1396a(a)(13)(E); Sec. 249, P.L. 92-603:

Sec. 1396a. State plans for medical assistance--Contents

(a) A State plan for medical assisance must--

(13) provide--

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary.

45 C.F.R. sec. 250.30(a)(3)(iv)(1976):

The State plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

Article X, Section 13, Florida Constitution:

Suits against the state.--

Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

Section 409.055, Florida Statutes (1977):

The department...shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, * * *

STATEMENT OF THE CASE

This case originated in the United States District Court for the Southern District of Florida under federal question jurisdiction, 28 U.S.C. sec. 1331. Florida nursing homes challenged the validity of a federal regulation concerning the time requirement for states participating in the Medicaid program to implement a reasonable cost-related plan for reimbursement of providers of nursing home services to welfare recipients.

Public Law 92-603, sec. 249, 42 U.S.C. sec. 1396a(a)(13)(E), effective July 1, 1976, requires participating states to reimburse nursing home pro-

viders on a "reasonably cost-related" basis. However, the Department of Health, Education and Welfare, by regulation codified as 45 C.F.R. sec. 250.30(A)(3)(iv)(1976), set January 1, 1978 as the effective date of the statute because HEW had been slow in promulgating regulations and did not wish to penalize the states because of its delay.[2]

On October 18, 1977, the District Court found the HEW regulation inconsistent with congressional mandate and ordered Florida to submit a new plan to HEW for approval and to reimburse under such approved (new) plan prospectively from the date of adjudication of invalidity.

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[2] See Memorandum Opinion of District Court for Southern District of Florida, dated October 1, 1977, reported at 442 F.Supp. 201 (S.D. Fla. 1977) and reproduced at Appendix IV.

On July 7, 1978 the District Court denied the motions of the nursing homes to require Florida to implement its new plan back to July 1, 1976. The District Court held this was a claim for retroactive damages for which federal court jurisdiction was barred by the Eleventh Amendment and this Court's ruling in Edelman v. Jordan, 415 U.S. 651 (1974). The District Court entered summary judgment in favor of the State and dismissed all claims by the nursing homes for retroactive benefits.

The Fifth Circuit Court of Appeals reversed this judgment in favor of the State. The Fifth Circuit agreed that the nursing homes were seeking payment of state funds as a result of a past breach of legal duty, which was a claim for retroactive damages barred by the Eleventh Amendment unless consented to

by the State. However, the Fifth Circuit held that Florida had waived its constitutional immunity against being sued on this claim in federal court because as part of the standard provider agreement, Florida and Medicaid providers mutually agreed to abide by all state and federal laws, regulations and guidelines.[3]

On September 16, 1978, after HEW had approved a new cost-related plan, the District Court ordered that payment be made under the new plan from October 1, 1977, reserving for trial the

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[3] The language appears in the sixth typewritten paragraph of a form agreement, containing two legal-sized pages in single space print. The paragraph reads verbatim:

> "Both the provider and the single state agency hereby agree to recognize and abide by all state and federal laws, regulations, and guidelines applicable to participation in and administration of, the Title XIX Medicaid Program."

question of whether the new plan met the statutory criteria of reasonably cost-related. (Appendix V)

Recently, on July 29, 1980, the District Court remanded the new plan back to HEW for reconsideration because HEW's previous review was deemed insufficient under criteria recently announced by the Fifth Circuit in Alabama Nursing Home Ass'n. v. Harris, 617 F.2d 388 (5th Cir. 1980). (Appendix VI)

REASONS FOR ALLOWANCE OF THE WRIT

The opinion below effectively nullifies this Court's landmark decision of Edelman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974).

This Court held in Edelman "that retroactive welfare benefits awarded by a Federal District Court to plaintiffs,

by reason of wrongful denial of benefits by state officials prior to entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment." Quern v. Jordan, 440 U.S. 332, 333-34, 59 L.Ed.2d 358, 362, 99 S.Ct. 1139 (1979).

Edelman specifically recognized: 1) that Eleventh Amendment immunity extended to past violations of federal law related to a cooperative federal-state program under the Social Security Act comparable to the Medicaid program; 2) that a state's agreement to administer such program in compliance with federal law did not constitute consent for it to be sued for retroactive damages in federal court; and 3) that a state's consent to waive its Eleventh Amendment immunity must be clear and express:

"The Court of Appeals held that as a matter of federal law Illinois had 'constructively consented' to this suit by participating in the federal AABD program and agreeing to administer federal and state funds in compliance with federal law. Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 53 L.Ed. 742, 29 S.Ct. 458 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S., at 54, 88 L.Ed. 1121 (footnote omitted):

> '[W]hen we are dealing with the sovereign

> exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'

The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.* * * The only language in the Social Security Act which purported to provide a federal sanction against a State which did not comply with federal requirements for the distribution of federal monies was found in former 42 U.S.C. sec. 1384 [42 U.S.C.S. sec. 1384](now replaced by substantially similar provisions in 42 U.S.C. sec.804), which provided for termination of future allocations of federal funds when a participating State failed to conform with federal law. This provision by its terms did not authorize suit against anyone, and standing alone,

> fell far short of a waiver by a participating State of its Eleventh Amendment immunity." Id., 415 U.S. at 673-74; 39 L.Ed.2d 678-79. [e.s.]

Contrary to Edelman, the opinion below holds that a state may be sued in federal court for retroactive damages growing out of its participation in a welfare program because the administering state agency agreed to abide by federal law. In effect, the opinion below approves concepts of constructive consent and implied waiver which this Court explicitly rejected in Edelman.

A state may not waive its Eleventh Amendment immunity by inference, and the State of Florida does not expressly consent to be sued in Federal Court because a state agency which can be sued in state court agrees to abide by federal law.

This Court has consistently held that a state statute consenting to suit against the state constitutes consent to be sued in state court,[4] not federal court. A statute waiving a state's common law immunity against suit in its own courts is immaterial to consideration of whether the state waives its immunity from suit in federal court under the Eleventh Amendment.[5]

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[4] See authorities discussed in Anno., 50 L.Ed.2d 928, sec. 15 at pp. 954-56. Also see Medicenters of America, Inc. v. Virginia, 373 F.Supp. 305 (E.D. Va. 1974), and Pharmacists Soc. of Milwaukee Cty. v. Dept. of Human Services, 79 FRD 405, 408-410 (E.D. Wisc. 1978), applying these authorities to bar federal court damage suits related to the medicaid program.

[5] See Nevada vs. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182, 1186-88 (1979), holding that a state's sovereign immunity from suit in its own courts does not provide a basis for a claim of immunity in another sovereign's court. The basis for a state's immunity from suit in federal court is the Eleventh Amendment to the U.S. Constitution, and a state must waive the immunity given under that Amendment to be sued in federal court.

Indeed, Edelman v. Jordan, supra, addresses this very point in footnote 19, 415 U.S. at 678, stating that whether Illinois had abolished its common law sovereign immunity in its state courts was not determinative of whether it had relinquished its Eleventh Amendment immunity in the federal courts.

Moreover, the State of Florida has not waived its Eleventh Amendment immunity by statute as required under Florida law. The state agency's agreement is immaterial to consideration of whether Florida has consented to suit in federal court since no overriding federal law or policy pertaining to the medicaid program mandates such consent by agreement. Under decisions of this Court, where no overriding federal law or policy exists, state law determines

whether the state has consented to suit in federal court.[6]

Florida's Constitution (Art. X, sec. 13) requires that consent to suit against the state as to any liability be given by general law. By virtue of this provision, no part of the state's immunity may be waived except by general law (statute) that is clear and unequivocal, and waiver may not occur by special act.[7] In Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), this

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6 Palmer v. Ohio, 248 U.S. 32, 63 L.Ed. 108, 39 S.Ct. 16 (1918); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945).

6 Hampton v. State Bd. of Educ., 105 So. 323 (1925); Spangler v. Florida State Turnpike Auth., 106 So.2d 421 (Fla. 1958); Arnold v. Shumpert, 217 So.2d 116, 119-20 (Fla. 1968); Manatee County v. Town of Long Boat Key, 365 So.2d 143, 147 (Fla. 1978).

Court examined a similar provision of the Indiana Constitution and held that Indiana required statutory waiver of its Eleventh Amendment immunity and that its executive branch was not authorized to consent to suit in federal court in particular cases:

> "We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases." 323 U.S. at 468.

No statute in Florida consents to suit against the state in federal court, and the state agency may not

contract away the state's Eleventh Amendment immunity, even if it had attempted to do so in this case.[8] Eleventh Amendment immunity may not be waived by the state agency for a particular class of persons in a particular kind of case. Either Florida has waived its Eleventh Amendment immunity by appropriate statute, or it has not.

Finally, even if the state agency could waive the state's immunity as to particular cases, its agreement to abide by federal law is not consent to suit against the state in federal court and

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[8] Whether the state agency could waive Eleventh Amendment immunity under Florida law by instituting suit in federal court or by failing to raise its immunity as a defense is not germane to the issues in this case.

is not a clear waiver of Eleventh Amendment immunity, for the following reasons:

1. The Eleventh Amendment is part of federal law. A constitutional right cannot be waived by agreeing to abide by federal law which confers that right. Constitutional rights are not foregone by an affirmation of their existence. If this be the law, then medicaid providers, who also agree to abide by federal law, thereby waive their constitutional right against self-incrimination regarding their participation in the program. And welfare recipients whose application acknowledges compliance with federal law thereby waive their constitutional right to due process. And so on.

2. Agreement to be bound by federal law is not the equivalent of consent to a damage suit in federal court for breach of federal law duty. State judges are required by Article VI of the United States Constitution to follow federal law. This Court presumes state courts will properly adjudicate claims arising under federal law[9] or involving questions of federal law.[10]

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[9] Hoffman v. Pursue, Ltd., 420 U.S. 592, 611, 43 L.Ed.2d 482, 496, 95 S.Ct. 1200 (1975); Dowd Box Co. v. Courtney, 368 U.S. 502, 508, 7 L.Ed.2d 483, 487, 82 S.Ct. 519 (1962).

[10] Pan American P. Corp. v. Superior Court, 366 U.S. 656, 663-64, 6 L.Ed.2d 584, 589-90, 81 S.Ct. 1303 (1961).

3. The state agency's agreement to abide by federal law is an acknowledgment of the obligation already imposed by operation of law. States electing to participate in the Medicaid program must comply with the requirements of Title XIX of the Social Security Act,[11] and their plans must conform with the requirements of federal law and regulations.[12] States are also required to enter provider agreements

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[11] Harris v. McRae, ___U.S.___, 65 L.Ed.2d 784, 794, 799 (1980).

[12] See King v. Smith, 392 U.S. 309, 317, 20 L.Ed.2d 1118, 1125, 88 S.Ct. 2128, note 12. Unless HEW (HHS) approves the plan, federal funds will not be made available 42 U.S.C. 1396; and if the state fails to comply with the plan, HHS may terminate federal payments. 42 U.S.C. sec. 1396(c). These provisions are comparable to those in the AFDC and AABD programs discussed in King v. Smith and Edelman v. Jordan, supra.

that set out the relationship and responsibilities of the parties.[13] Since the state's agreement to abide by federal law as part of the plan does not consent to suit in federal court (Edelman, supra), a state agency's recognition of that obligation in a provider agreement required to carry out the plan has no greater consequence. All applicable federal requirements necessarily are part of the provider agreement.[14]

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[13] See 45 CFR sec. 205.100(a)(2)(ii) (1977).

[14] See Farmers and Merchants Bank vs. Federal Reserve Bank, 262 U.S. 649, 67 L.Ed. 1145, 1164 (per Justice Brandeis): "Laws which existed at the time and place of the making of a contract...form a part of it, as fully as if they had been expressly referred to or incurred in its terms."

The practical effect of the opinion below is that any time a state agency expresses its intent to abide by federal law, the State waives its Eleventh Amendment immunity. Since the State must comply with federal law as a condition to participation in the Medicaid program, this expression is inevitable and might occur in a state regulation, in correspondence, or in a handbook about the program. It is no longer necessary for a state statute to waive Eleventh Amendment immunity, and the requirements of state law regarding waiver of immunity may be completely ignored.

If the Eleventh Amendment is properly respected, respondent nursing homes can seek recourse against Florida by suit in state court, and they now have an action pending in state court to recover the same retroactive benefits being sought in this case.[15] Under Florida law, equitable principles will control whether retroactive benefits are awarded for the period prior to court-ordered clarification of the state's duty under federal law.[16]

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15 Florida Health Care Ass'n v. Page, Case No. 79-2564, Circuit Court for Leon County, Florida.

16 See Gulesiar v. Dade County School Board, 281 So.2d 325 (Fla. 1973).

Congress has recognized the propriety of requiring Medicaid providers to seek recourse elsewhere than federal court. On the same day as it was to go into effect, Congress repealed a statute requiring states in the medicaid program to waive their federal court immunity as to hospital provider suits.[17] Hospital Ass'n. of New York, Inc. v. Toia, 577 F.2d 790, 796 (2d Cir. 1978) explains that repeal of this mandatory waiver eliminated the ability of hospital providers to seek redress in federal court. But it was emphasized that this was only one form of remedy and that hospital providers still had recourse to state courts and HEW administrative proceedings.

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[17] See P.L. 94-182, sec. 111 and P.L. 94-552. Apparently, the mandatory waiver was passed initially in response to Edelman v. Jordan, supra.

There are literally thousands of federal statutes, regulations and guidelines which states administering the various welfare programs can violate in good faith. The opinion below could have an immense budgetary impact on the states if federal courts are insensitive to their fiscal problems.

The nursing home industry is attacking the validity of current reimbursement plans around the country because federal executives failed to properly implement federal statutes. Millions and millions of dollars are potentially involved, even if the attacks are restricted to the issues raised in this case.

For states which followed the January 1978 federal time regulation, there is the potential cost of imple-

menting current plans back to July 1, 1976. And for states whose current plans will have to be re-reviewed because HEW review standards were insufficient under Alabama Nursing Home Ass'n v. Harris, 617 F.2d 388 (5th Cir. 1980), there is the potential cost of implementing revised plans developed under current standards back to July 1, 1976.

Finally, the opinion below results in an anomalous distinction between persons to whom the State owes a duty to comply with federal law. Welfare recipients in Florida cannot sue the State for retroactive benefits in

federal court, but service providers are allowed access to federal court for that purpose.

The respondent nursing homes in related Case No. 80-85 triumph this as the important issue in the case. They indicate by letter to the Court dated August 15, 1980, that this Petition would address "...the extremely important and crucial issue of retroactive Eleventh Amendment immunity as regards private business service providers."

Florida submits that health care providers have no special exemption

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[18] See Owen v. Roberts, Case No. 73-423-Civ-J-S (M.D. Fla. 1974)(3-judge panel), applying Edelman v. Jordan, supra, to deny retroactive benefits in a suit by welfare recipients against Petitioner to declare certain state eligibility regulations in conflict with federal law.

from the Eleventh Amendment. Whether recipients or providers are involved, Florida is entitled to have its own courts decide whether damages should be awarded against it for breach of legal duty not clarified by court order.[19]

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[19] The opinion below cites New York State Ass'n for Retarded Children v. Kerry, 596 F.2d 27, 39 (2d Cir. 1979), as indicating basis for federal jurisdiction. That case dealt with prospective damages awarded to enforce compliance with a federal court order which the state failed to follow. Retroactive damages were not involved.

CONCLUSION

The opinion below clearly departs from controlling precedent of this Court and creates serious potential consequences for states participating in the Medicaid program. Summary disposition should be made on the merits to reinstate the judgment of the District Court. See Supreme Court Rule 23.1 and Alabama v. Pugh, 483 U.S. 783, 98 S.Ct. 3057, 57 L.Ed.2d 1115 (1978).

Respectfully submitted,

CULPEPPER, BEATTY & TURNER
Post Office Box 10261
600 Lewis State Bank Bldg.
Tallahassee, FL 32302
(904) 222-4945

BY:
M. STEPHEN TURNER
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October , 1980, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to ELLIOTT SHAW, ESQUIRE, Suite 611, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132; A. THOMAS MIHOK, ESQUIRE, 5458 Woodcrest Drive, North, Orlando, FL 32807; and THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

M. STEPHEN TURNER
CULPEPPER, BEATTY & TURNER
Post Office Box 10261
600 Lewis State Bank Bldg.
Tallahassee, FL 32302

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CASE NO. _____

FLORIDA DEPARTMENT OF HEALTH
and REHABILITATIVE SERVICES, et al.,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

APPENDIX

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APPENDIX NO.	ITEM DESCRIPTION
I	Decision of Fifth Circuit Court of Appeals dated May 6, 1980.
II	Order of Fifth Circuit Court of Appeals Denying Rehearing, dated July 22, 1980.
III	Order of District Court for Southern District of Florida dated July 7, 1978 (granting judgment in favor of the State on all questions regarding Plaintiff's entitlement to retroactive benefits).
IV	Memorandum Opinion and Order of District Court for Southern District of Florida dated October 18, 1977.
V	Order of District Court of Southern District of Florida dated September 16, 1978.
VI	Order of District Court for Southern District of Florida dated July 28, 1980.

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-2745, 77-3467

FLORIDA NURSING HOME ASSOCIATION, et al.,
Plaintiff-Appellants,

v.

WILLIAM PAGE, JR., et al.,
Defendants-Appellees.

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,
Plaintiffs-Appellants,

v.

PATRICIA ROBERTS HARRIS, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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May 6, 1980

Before AINSWORTH and HENDERSON, Circuit Judges, HUNTER, District Judge.

AINSWORTH, Circuit Judge:

These consolidated appeals arise from separate orders of the United States District Court for the Southern District of Florida. The orders resulted from partial adjudications in two suits brought by several Florida nursing homes against the Florida Department of Health and Rehabilitative Services (DHRS) and its secretary and the secretary and regional director of Health, Education and Welfare (HEW) concerning plaintiffs' rights to receive payments on a "reasonable cost-related basis" for services rendered under the Medicaid program of the Social Security Act (the Act). 42 U.S.C. § 1396 et seq.

Both suits sought to have a regulation issued by HEW, 45 C.F.R. § 250.3(a)(3)(iv) (1976), declared invalid. This regulation establishes January 1, 1978 as the date by

which states participating in the Medicaid program were required to implement a plan to reimburse providers of services on a reasonable cost-related basis. Section 249 of the Social Security Act, 42 U.S.C. § 1396a(a)(13)(E), however, fixes July 1, 1976 as the effective date for implementing such a plan for reimbursement.

In the first suit, brought by Golden Isles Convalescent Center, Inc. and other licensed nursing homes in Dade and Broward Counties, Florida (referred to collectively as Golden Isles), the district court upon plaintiffs' motion for summary judgment held the administrative regulation invalid as inconsistent with the congressional mandate provided for in the Act. In partially granting Golden Isles' motion for summary judgment, the court held that plaintiffs were entitled to payment from the state on

a reasonable cost-related basis prospectively from the date of its ruling, October 18, 1977. It also ordered Florida DHRS to submit a plan effective October 18 and approved by HEW in compliance with the Act's mandate for providing a cost-related reimbursement plan. The court reserved ruling on the question of plaintiffs' entitlement to reimbursement retroactively from July 1, 1976, the date set out in the statute. In its order the court also ruled that its exercise of jurisdiction and venue were proper, despite objections by defendants that exclusive jurisdiction lies in the United States Supreme Court and that venue was proper only in the Northern District of Florida, the location of the main offices of the DHRS. Defendant Florida DHRS appealed the court's order. The issues raised by appellant constitute the substance of the first appeal before us,

which appeal will be referred to as the Golden Isles case (No. 77-3467).

In the second suit, the court also granted a partial summary judgment in favor of plaintiffs, Florida Nursing Home Association and its nursing home members (collectively referred to as Florida Nursing Home). In its order the court incorporated its opinion in the Golden Isles case invalidating the HEW regulation and requiring the state to reimburse plaintiffs on a reasonable cost-related basis from October 18, 1977 prospectively. Once again, a ruling on plaintiffs' right to retroactive relief was reserved by the district court until it considered written memoranda submitted by the parties. No appeal was taken by defendants from this order.

While Florida's appeal from the partial summary judgment in the Golden Isles case

was still pending in this court, the district court consolidated for trial the Golden Isles and Florida Nursing Home cases for a determination whether the current approved plan submitted by Florida DHRS complies with the applicable Social Security statute. In its order the court also entered judgment in favor of defendant Florida DHRS denying plaintiffs Golden Isles and Florida Nursing Home retroactive reimbursement from the state on a reasonable cost-related basis for services rendered prior to October 18, 1977. Plaintiffs appealed the court's ruling regarding their right to retroactive payments. The issue of plaintiffs-appellants' entitlement to reimbursement from the state on a reasonable cost-related basis prior to October 18, 1977 constitutes the substance of the second appeal to be addressed by us, which we will

refer to as the Florida Nursing Home case (No. 78-2745).

Golden Isles Case (No. 77-3467)

In its appeal of the court's partial granting of Golden Isles' motion for summary judgment, appellant Florida DHRS asserts the district court erred in four respects. We disagree and affirm the court's ruling.

I.

[1] Appellant first contends that the district court was without jurisdiction to hear this controversy because original and exclusive jurisdiction lies in the United States Supreme Court. Florida argues that since this action constitutes a controversy between a state and its own citizens under article III, section 2, clause 2 of the United States Constitution, the Supreme Court has original and exclusive jurisdiction.

Appellant's contention is erroneous.

It is well established that the United States Constitution grants neither original nor exclusive jurisdiction to the United States Supreme Court over controversies between a state and its own citizens. C. Wright, Law of Federal Courts 557 (3d ed. 1976). The first paragraph of section 2 of article III of the constitution provides in pertinent part:

> The judicial Power shall extend . . . to Controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States . . ..

The second clause, which appellant relies on here, states:

> In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned the supreme Court shall have appellate jurisdiction . . ..

In interpreting these provisions, the

Supreme Court several years ago in California v. Southern Pacific Co., 157 U.S. 229, 258, 15 S.Ct. 591, 602, 39 L.Ed. 683 (1895), made it clear that the language of clause 2 "[i]n all Cases . . . in which a State shall be [a] Party," means in all the cases enumerated in clause 1 of article III, section 2. Nowhere in clause 1 is there mention of a controversy between a state and its own citizens. As the Supreme Court firmly stated: "By the Constitution . . . this court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, but not of controversies between a state and its own citizens . . .." Id. at 258, 15 S.Ct. at 602. See Texas v. Interstate Commerce Commission, 258 U.S. 158, 163, 42 S.Ct. 261, 263, 66 L.Ed. 531 (1922); Minnesota v. Northern Securities Co., 184 U.S. 199, 245-46, 22 S.Ct. 308, 325-26,

46 L.Ed. 499 (1902).

This rule has been codified in the statutory provision which describes the original jurisdiction of the Supreme Court. See 28 U.S.C. § 1251. Although section 1251(b)(3) provides for the Supreme Court's original, but not exclusive, jurisdiction of all actions by a state against the citizens of another state, there is no provision for controversies between a state and its own citizens.

Golden Isles brought this suit alleging violations by Florida of 42 U.S.C. § 1396a. The district court's ruling that it had jurisdiction over this action pursuant to 28 U.S.C. § 1331(a), which provides for the district court's jurisdiction of all actions arising under the laws of the United States wherein the amount in controversy exceeds $10,000, was thus proper.

II.

Appellant Florida DHRS next contends that venue was proper only in the Northern District of Florida where the principal offices of DHRS and its secretary are located. It asserts that when a state officer or agency is sued for the purpose of compelling official action, venue lies only in the district wherein the agency and its executive officers maintain their official residences. Our review of the statute and the important considerations underlying the choice of a proper forum lead us to conclude that appellant's assertion that venue is improper in the Southern District of Florida is erroneous..

Venue is governed by the federal venue statute, 28 U.S.C. § 1391(b), which provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants

reside, or in which the claim arose, except as otherwise provided by law.

The general rule in suits against public officials is that a defendant's residence for venue purpose is the district wherein he performs his official duties. 1 Moore's Federal Practice ¶0.142[5.-1-2], at 1396 (2d ed. 1979). See, e. g., Butterworth v. Hill, 114 U.S. 128, 132, 5 S.Ct. 796, 798, 29 L.Ed. 119 (1885); O'Neill v. Battisti, 472 F.2d 789, 791 (6th Cir. 1972), cert. denied sub nom. Heitzler v. O'Neill, 411 U.S. 964, 98 S.Ct. 2142, 36 L.Ed.2d 685 (1973). A number of the cases applying this principle have involved federal officials or agencies and have found only one official residence. See, e.g., Ernst v. Secretary of the Interior, 244 F.2d 344, 17 Alaska 133 (9th Cir. 1957); Trueman Fertilizer Co. v. Larson, 196 F.2d 910 (5th Cir. 1952); Hartke v. Federal Aviation Administration, 369 F.Supp. 471 (E.D.N.Y.1973).

It has been held, however, that a state agency or official does not necessarily have a single residence. See Buffalo Teachers Federation, Inc. v. Helsby, 426 F.Supp. 828 (S.D.N.Y.1976). In Buffalo Teachers Federation the court noted that in suits against federal agencies, the federal government would be faced with serious difficulties if it were forced to answer complaints in a multitude of forums and forum shopping would be greatly encouraged if suits could be brought in any district where a subordinate departmental officer resides. Such problems, however, "are significantly less serious in the context of a suit against a state governmental entity or official." Id. at 829. In the state context, there is little threat of inconvenience or even forum shopping, at least sufficient "to warrant a blanket rule that there may never be more than a single residence." Id. In Buffalo Teachers

Federation the court determined that although the state agency involved had its central headquarters in the Northern District of New York, venue was not lacking in the Southern District where the suit was brought. The agency involved maintained a field office in the Southern District and a significant portion of its business was conducted from that office.

Here, Florida DHRS, though headquartered in the Northern District of Florida, maintains a large office in the Southern District and much of its business is transacted from that office. Furthermore, the venue statute makes it clear that the residence of defendants does not provide the only basis for venue. Venue is also proper in the district where the claim arose. Though the legislative history of section 1391(b) fails to suggest what the draftsmen thought about the question of where

a claim arises, 1 Moore's Federal Practice ¶0.142[5.-2], at 1423 (2d ed. 1979), when the statute was amended to extend venue to a district "in which the claim arose," the purpose was to "facilitate the disposition of . . . claims by providing a more convenient forum to the litigants and witnesses involved." H.R.Rep.No. 1393, 89th Cong., 2d Sess 2 (1966). Thus, "where the claim arose" should be "ascertained by advertence to events having operative significance in the case, and a common-sense appraisal of the implications of those events for accessibility to witnesses and records." Lamont v. Haig, 590 F.2d 1124, 1134 (D.C.Cir.1978). This is not to suggest that only a single district can satisfy the statutory standard with respect to any given claim. Often, the factors deemed determinative might well indicate the suitability of several forums. See, e.g., Commercial Lighting Products, Inc. v.

United States District Court, 537 F.2d 1078, 1080 (9th Cir. 1976); Tefal, S.A. v. Products International Co., 529 F.2d 495, 496-97 (3d Cir. 1976); Gardner Engineering Corp. v. Page Engineering Co., 484 F.2d 27, 32-33 (8th Cir. 1973). In any case, the court should not oppose the plaintiffs' choice of venue if the activities that transpired in the district where suit is brought were not insubstantial and the forum is a convenient one balancing the equities and fairness to each party. Lamont v. Haig, supra, 590 F.2d at 1134 n. 62; Weil v. New York State Department of Transportation, 400 F.Supp. 1364, 1365 (S.D.N.Y. 1975).

Applying this standard, then, it is clear that venue properly lies in this matter in the Southern District of Florida. Not only does appellant maintain a large office there but the payments which Golden Isles is

seeking were allegedly due it within the Southern District where Golden Isles and the other plaintiffs-appellees are located. This is sufficient in the circumstances of this case to justify the placing of venue in the Southern District of Florida.

III.

Appellant's third contention is that the Eleventh Amendment to the United States Constitution bars the district court's directive that the Florida agency submit a plan for reimbursing Golden Isles in accordance with the requirements of the Medicaid statute. Appellant argues that the court's order constitutes a prohibited ruling against the state itself, binding the state in contravention of the Eleventh Amendment to a particular course of conduct. Florida's argument is without merit.

The Supreme Court held in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d

662 (1974), that a federal court decree mandating that a state officer or agency administering a federal entitlements program comply with the requirements of the federal act creating the program is not void by virtue of the Eleventh Amendment, even though the state official will necessarily be required to spend money from the state treasury to carry out the court's order. Id. at 667-68; 94 S.Ct. at 1357-58. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This is a well-established principle and has been applied consistently by courts in cases involving matters similar to that confronting us here. See Rothstein v. Wyman, 467 F.2d 226, 236 (2d Cir. 1972), cert. denied. 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973); Hempstead General Hospital v. Whalen, 474 F.Supp. 398, 406 (E.D.N.Y.1979); Alabama

Nursing Home Association v. Califano, 433 F.Supp. 1325, 1330-31 (M.D.Ala.1977); Pharmacists Society of Milwaukee County, Inc. v. Department of Health and Social Services, 79 F.R.D. 405, 408 (E.D.Wis.1978).

Here, the district court's order does no more than require Florida DHRS, prospectively from the date of its order, to comply with the Social Security Act's mandate that it reimburse providers of skilled nursing services on a reasonable cost-related basis. Judicial enforcement of the statute's requirements is therefore appropriate, see Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and the Eleventh Amendment is no bar where by its terms the court's decree is prospective in nature. Edelman, supra, 415 U.S. at 667-68, 94 S.Ct. at 1358.

IV.

Appellant's final contention is that the court improperly granted in part Golden Isles' motion for summary judgment since there exists a material issue of fact as to whether the state's current Medicaid plan meets the requirements of section 249 of the Social Security Act. Florida's contention misperceives the court's ruling.

In its order the district court did not rule that the current Florida Medicaid plan was not in conformity with the Act's requirement that the agency reimburse providers of services on a reasonable cost-related basis. Rather, the court's order merely directed HEW, in accordance with section 249, to determine whether the current Florida plan is in conformity with the statute. If HEW's determination was adverse to the state, Florida DHRS was directed to submit a conforming plan

to be approved by HEW. Once HEW approved the plan, the final determination whether the plan meets the requirements of section 249 was reserved for trial. Thus, the court's order was not dispositive of any factual dispute.

The district court did not err, therefore, in partially granting Golden Isles' motion for summary judgment as there were only issues of law presented and plaintiffs were entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978).

Accordingly, this judgment is AFFIRMED.

Florida Nursing Home Case
(No. 78-2745)

In this consolidated case, appellants Florida Nursing Home and Golden Isles appeal from the court's order denying their claim

for reimbursement on a reasonable cost-related basis for nursing services provided by appellants prior to October 18, 1977, the date of the court's entry of a partial summary judgment in the Golden Isles litigation. This appeal presents one basic issue: whether the Eleventh Amendment to the United States Constitution operates as a bar to the retroactive relief sought by appellants. We find that under the circumstances of this case, Florida has waived its Eleventh Amendment immunity by consenting to be sued in federal court under the terms of its contracts with appellants.

Under the Eleventh Amendment an unconsenting state is immune from suits brought in federal court by her own citizens. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890); Parden v. Terminal Railway, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

It is well established that suits brought against an agency of the state are in fact suits against the state and covered by the Eleventh Amendment. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). Defendant-appellee Florida Department of Health and Rehabilitative Services is an agency of the Florida state government created by the Legislature. See Fla.Stat.Ann. § 409.016 et seq. (West 1973 & Supp.1979). The relief sought by appellants is reimbursment from the state agency on a reasonable cost-related basis as required by section 249 of the Social Security Act for nursing services rendered from July 1, 1976, the effective date of the Act. As noted earlier, the

district court's order denied such relief for any services provided prior to October 18, 1977, the date of the court's ruling. The effect of an award granting Golden Isles and Florida Nursing Home their requested relief will require the payment of state funds as a result of a past breach of a legal duty on the part of the state. Since this relief is retroactive in nature, if not consented to by the state, plaintiffs' action in federal court is barred by the Eleventh Amendment. Edelman, supra, 415 U.S. at 668, 94 S.Ct. at 1358. Thus, the sole issue reduces itself to a determination whether the State of Florida has consented to this action and effected a waiver of its sovereign immunity under the Eleventh Amendment.

For the purposes of this suit, the Florida Department of Health and Rehabilitative Services

is governed by Fla.Stat.Ann. § 402.34 (West Supp.1979). This section provides in pertinent part:

> The department is a body corporate . . . . It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess corporate powers for all purposes necessary to administer this chapter. . . .

By creating this department with authority to sue and be sued the State of Florida has expressly waived its sovereign immunity. This language, standing alone, however, does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. See Smith v. Reeves, 178 U.S. 436, 441, 20 S.Ct. 919, 921, 44 L.Ed. 1140 (1900); Scott v. Board of Supervisors, 336 F.2d 557, 558 (5th Cir. 1964).

Nevertheless, the state has done more here than merely waive its general immunity

from suit in its own state courts. Pursuant to its corporate powers as outlined in section 402.34, Florida DHRS drafted and executed a contract with each appellant which outlines the precise obligations of the agency and the provider of services and which each provider signed as a prerequisite to its participation in the Medicaid program. The sixth paragraph of the agreement which Florida entered into with appellants states:

> Both the provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

By contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach

of these laws.

While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, Edelman, supra, 415 U.S. at 673, 94 S.Ct. at 1361, the "overwhelming implication," id. 94 S.Ct. at 1361, of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity by requiring the DHRS to recognize and abide by all federal laws in participating in the Medicaid program. To bar federal court jurisdiction in this case could operate to immunize state officers and the agency from their contractual duty to adhere to federal statutory requirements. See generally New York. State Association for Retarded Children v. Carey. 596 F.2d 27, 39 (2d Cir. 1979). A contrary holding in the circumstances of this case, where appellants

Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result. Accordingly, we reverse this judgment of the court.

AFFIRMED, as to Golden Isles Case (No. 77-3467).

REVERSED, as to Florida Nursing Home Case (No. 78-2745).

APPENDIX II

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-2745, 77-3467

FLORIDA NURSING HOME ASSOCIATION, et al.,
Plaintiff-Appellants,

v.

WILLIAM PAGE, JR., et al.,
Defendants-Appellees.

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,

Plaintiffs-Appellants,

v.

PATRICIA ROBERTS HARRIS, etc., et al.,
Defendants-Appellees.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion May 16, 1980, 5 Cir., 1980,
_____F.2d _____)

(July 22, 1980)

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER, District Judge.

PER CURIAM:

The Petition for Rehearing of defendant-appellee Florida Department of Health and Rehabilitative Services is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) its Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert A. Ainsworth, Jr.
United States Circuit Judge.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

NO: 76-1810-CIV-WMH
77-559-CIV-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,	:
Plaintiff,	:
vs.	:
JOSEPH A. CALIFANO, JR., etc., et al.,	:
Defendants.	:

FLORIDA NURSING HOME ASSOC., et al.,	:
Plaintiff,	:
vs.	:
WILLIAM J. PAGE, JR., et al.,	:
Defendants.	:

THIS CAUSE having come on to be heard upon pending motions and for status conference, it is

ORDERED AND AJUDGED that this cause and the case of Florida Nursing Home v.

Page, #77-559-CIV-WMH, be consolidated for trial insofar as the issues as to "reasonable cost related basis" are concerned.

* * *

As to the plaintiffs' petition, ore tenus, to review the Court's order on the retroactivity recovery claims, the Court being advised of an ambiguity in this Court's order denying the retroactive relief dated February 13, 1978 in the Golden Isles case, #76-1810-CIV-WMH, now consolidated for trial with the Florida Nursing Home, as stated above, and having considered additional argument on the question of retroactive relief, it is

ORDERED AND ADJUDGED that judgment be and it is hereby entered in favor of the state defendants and against the plaintiffs' entitlement to retroactive benefits prior to October 18, 1977, on

the basis that such claims are barred by the 11th Amendment. See Edelman v. Jordan, 415 U.S. 651 (1974).

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 7th day of July, 1978.

/s/ William M. Hoeveler
U.S. DISTRICT JUDGE

APPENDIX IV

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

NO. 76-1810-Civ-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., d/b/a HALLANDALE REHABILITATION CENTER, et al.,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., individually, and as Secretary of Health, Education and Welfare, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT

October 18, 1977

Before HOEVELER, United States District Judge

HOEVELER, District Judge:

Certain nursing home operations located

in this District have brought suit against the State Department of Health and Rehabilitative Services, the Federal Department of Health, Education and Welfare, and their respective executive officers to require implementation of Public Law 92-603, Sec. 249, 42 U.S.C. Sec. 1396a(13)(E), hereinafter Sec. 249).

Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1331. Venue, though objected to by the State defendants, lies in this district.

At the present time, the plaintiffs' Motion for Summary Judgment is before this Court. As will be set out more fully in this opinion, the Court is unable to adjudicate the whole case upon the present state of the pleadings and will therefore treat Plaintiffs' Motion as one brought under Rule 56(d), Federal Rules of Civil Procedure.

Plaintiffs are providers of skilled nursing facility services to the State of Florida which participates in the Medicaid Program with the Federal Government. Under the program, payments are made by the designated State agency to qualified beneficiaries, including Plaintiffs. These payments come from State and Federal sources and are made in accordance with regulations approved by the Secretary of Health, Education and Welfare.

This dispute centers around the regulations issued by HEW (45 C.F.R. Sec. 250.30 (a)(3)(iv)) requiring the State participants to provide reimbursements "on a reasonable cost related basis" to skilled nursing home facilities. The regulation sets an effective date of January 1, 1978. However, Section 249 sets an effective date of July 1, 1976. HEW contends that it was slow in

promulgating regulations and that it did not wish to penalize State participants for its own delay.

Since this case was commenced, the opinion of Judge Frank M. Johnson, Jr., in Alabama Nursing Home Association v. Califano, 433 F. Supp. 1325 (M.D. Ala. 1977) has been filed. Many of the same arguments brought before this Court by plaintiffs and defendants were addressed by Judge Johnson in some detail.

This Court is in substantial agreement with Judge Johnson that the portion of 45 C.F.R. Sec. 250.30(a)(3)(iv) setting an effective date of January 1, 1978, for implementation of Section 249 is inconsistent with the Congressional mandate. Therefore, the regulation is invalid insofar as it sets an effective date other than July 1, 1976.

The State of Florida has a present ability to calculate nursing home reimbursement rates on a cost related basis within the

meaning of Section 249. The deposition of Hugo Jordan, Reimbursement Supervisor, Nursing Home Program, State Department, Florida Department of HRS establishes that the State has the necessary data to promulgate a plan conforming to Section 249 on cost related basis effective immediately. There is some dispute as to whether or not the present plan conforms to Section 249, but the mandate of Congress clearly calls on the Secretary of HEW to make this determination administratively.

Accordingly, the Department of HEW is hereby directed to determine whether the plan of the State of Florida is in present conformity with the requirements of Section 249. The Department must determine whether the current Florida plan provides for reimbursement on a reasonable cost related basis to skilled nursing care providers.

The Department is directed to advise this Court of its determination within ten (10) days of the date of this Order. If the present plan (as is strongly urged by Plaintiffs) is not conforming, in the opinion of the Secretary, the State defendants are directed to submit a plan for approval to the Secretary no later than thirty (30) days from the date of this Order. Additionally, any plan submitted to the Department of HEW for approval by the State must make provision for the reimbursement to plaintiffs on a reasonable cost related basis for services rendered from the date of this Order prospectively. The Department of HEW is prohibited and enjoined from approving any State plan not providing for the reimbursement of these plaintiffs on a reasonable cost related basis as of the date of this Order.

The question of plaintiffs' entitlement to retroactive relief will be reserved at this time. Plaintiffs are directed to submit memoranda on this point no later than November 4, 1977. Defendants shall submit opposing memoranda by November 18, 1977. No further memoranda in response shall be allowed except upon leave of Court.

DONE AND ORDERED this 18th day of October, 1977, at Miami, Florida.

/s/ William M. Hoeveler
UNITED STATES DISTRICT JUDGE

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FLORIDA NURSING HOME ASSOCIATION, et al.,

v.

WILLIAM J. PAGE, JR., Individually and as Secretary of the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, et al.

CASE NO. 77-559-CIV-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,

v.

JOSEPH A. CALIFANO, JR., et al.

CASE NO. 76-1810-CIV-WMH

ORDER

AND NOW, this 16th day of September, 1978, upon consideration of plaintiffs, Florida Nursing Home Association, et al.'s Motion to Compel Defendants, William J. Page, Jr., Secretary of Department of Health and Rehabilitative

Services, to Reimburse the Plaintiff Nursing Home Pursuant to the Current Approved Title XIX State Plan Retroactive to October 18, 1977 Forthwith and Thereafter to Make Final Settlement Pursuant to a Title XIX State Plan That is in Compliance with the Social Security Law, it is hereby

ORDERED AND DECREED that the State of Florida, Department of Health and Rehabilitative Services shall:

(1) By using the methods of reimbursement under the currently approved plan, recompute the amount of reimbursement due plaintiff nursing homes for services performed pursuant to the State of Florida, Title XIX, Medicaid plan retroactive to October 1, 1977.

(2) Within thirty (30) days of the date hereof issue to each Home full payment of any amounts determined to

be the difference between what each Home did receive and what each Home would have received under the currently approved plan.

(3) Continue to reimburse the plaintiff nursing homes for Title XIX, Medicaid services performed at rates of reimbursement not less than those established under the currently approved plan with further voluntary increased rates of reimbursement of further order of the Court.

(4) That the matter be placed on the Fall 1978 trial list so that a full hearing will be held to determine whether the current State of Florida, Title XIX, Medicaid plan reimburses plaintiff nursing homes on a reasonable cost-related basis as required by 42 U.S.C. Sec. 1396a (a)(13)(E).

BY THE COURT:

/s/ William M. Hoeveler
U.S.D.J.

APPENDIX VI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FLORIDA NURSING HOME ASSOCIATION, et al.,

Plaintiffs,

v.

WILLIAM J. PAGE, JR. et al.,

Defendants.

No. 77-559-Civ-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,

Plaintiffs,

v.

JOSEPH A. CALIFANO, JR., et al.,

Defendants.

No. 76-1810-Civ-WMH

ORDER

THIS CAUSE is before the Court for status conference and review in light of the decision of the Court of Appeals for the Fifth Circuit in Alabama Nursing

Home Ass'n. v. Harris, 617 F.2d 388 (5th Cir. 1980). Having heard the arguments of counsel and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The trial of this cause and all pending discovery matters are hereby stayed until further order of this Court.

* * *

4. The Florida Long Term Care Reimbursement Plan is hereby referred to the Department of Health and Human Services (HHS) for compliance with its regulatory duties as set forth in the Alabama decision, supra.

a. This Court retains jurisdiction of this cause to ensure that the federal Defendants comply with this order and with the decision of the Court of Appeals.

b. This order is without prejudice to Plaintiffs' right to challenge the payment rates on remand should the Department, in the proper exercise of its agency duties, determine that the Florida Plan meets federal standards.

c. HHS shall have one hundred thirty-five (135) days from the date of this order within which to fully comply with this order and with the decision of the Fifth Circuit. Extensions will be considered only upon a showing of extreme hardship and unforeseeable change in circumstances, as the time now allotted, in addition to that which has already elapsed since the decision, is more than sufficient.

5. Both State and federal Defendants shall file with the Court status reports indicating the progress being made toward compliance with this order.

The first status reports shall be filed thirty (30) days from the date of this order, and thereafter reports shall be filed at 30-day intervals until completion of the actions required by this order.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 28th day of July, 1980.

/s/ William M. Hoeveler
UNITED STATES DISTRICT JUDGE

Supreme Court U.S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-532

In The

Supreme Court of the United States

October Term, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT FLORIDA NURSING HOME ASSOCIATION

DEMPSEY & SLAUGHTER, P.A.
Suite 610, Eola Office Center
605 East Robinson Street
Orlando, Florida 32801
(305) 422-5166

By: A. THOMAS MIHOK
Counsel for Respondent
FLORIDA NURSING HOME ASSOCIATION

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED

Whether Florida waived eleventh amendment immunity from suit in federal court for retroactive damages when it entered into, and then breached, a contract with nursing homes providing services under the Medicaid program, where the contract provided that Florida and the nursing homes would recognize and abide by federal law pertaining to the Medicaid program, but where Florida failed to reimburse the nursing homes for services rendered on a reasonable cost-related basis effective July 1, 1976, as required by Public Law 92-603, §249, 42 U.S.C. §1396a(a)(13)(E).

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In The

Supreme Court of the United States

October Term, 1980

No. 80-532

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT FLORIDA NURSING HOME ASSOCIATION

The Respondent, FLORIDA NURSING HOME ASSOCIATION, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 616 F.2d 1355.

PARTS OF PETITION ADOPTED

Respondent, FLORIDA NURSING HOME ASSOCIATION, adopts and incorporates by reference the following portions of the petition: (1) statement of parties to the proceeding; (2) opinions below; (3) jurisdiction; and, (4) constitutional and statutory provisions involved.

STATEMENT OF THE CASE

On March 8, 1977, Respondent FLORIDA NURSING HOME ASSOCIATION, on behalf of itself and all of its member facilities, filed a complaint in the United States District Court for the Southern District of Florida against the FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES (DHRS) and the UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (HEW). This action, captioned *Florida Nursing Home Association, et. al. v. Page, et. al.* (hereafter *"Page"),* was brought under federal question jurisdiction, 28 U.S.C. §1331. The complaint alleged, among other things, (1) that nursing home providers should be reimbursed for services rendered to Medicaid patients on a reasonable cost-related basis effective July 1, 1976, as required by 42 U.S.C. §1396a(a)(13)(E)[1] and the Florida Nursing Home Medicaid Provider Agreement;[2] (2) that the then Florida Title XIX Medicaid Reimbursement Plan did not reimburse providers on a reasonable cost-related basis; and (3)

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[1]*42 U.S.C.* §1396a(a)(13)(E), provides in pertinent part: A State plan for medical assistance must . . . provide . . . effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary.

[2]Florida DHRS drafted and executed a contract with each nursing home provider in the Medicaid program which outlines the obligations of each party to the contract. Each nursing home provider had to sign the contract as a prerequisite to its participation in the Medicaid program. The sixth paragraph of the agreement states: "Both the provider and the single state agency hereby agree to recognize and abide by all state and federal laws, regulations and guidelines applicable to participation in and administration of the Title XIX Medicaid program."

that HEW regulation, 45 C.F.R. §250.30(a)(3)(iv),[3] which purported to require nursing homes to be paid on a reasonable cost-related basis effective January 1, 1978, was void because of its conflict with 42 U.S.C. §1396a(a)(13)(E).

While the *Page* action was pending before the district court, that court had before it a similar matter captioned *Golden Isles Convalescent Center v. Califano, et. al.*, 442 F. Supp. 201 (S.D. Fla. 1977). In the *Golden Isles* case, which was filed in October of 1976, several nursing home providers located in the southern part of Florida brought suit against DHRS to require implementation of 42 U.S.C. §1396a *et seq.* The plaintiffs in *Golden Isles* also sought to have 45 C.F.R. §250.30(a)(3)(iv) declared invalid.[4]

On October 18, 1977, the district court in *Golden Isles* held that 45 C.F.R. §250.30(a)(3)(iv) was invalid because it was in direct conflict with 42 U.S.C. §1396a(a)(13)(E), which set the effective date for reasonable cost-related reimbursement as July 1, 1976. The district court reserved its decision regarding the issue of whether the nursing home providers were entitled to reimbursement on a reasonable cost-related basis retroactive to July 1, 1976, but held that the *Golden Isles* homes were entitled to reimbursement on a reasonable cost-related basis from October 18, 1977, prospectively.

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[3]45 C.F.R. §250.30(a)(3)(iv) (1976), provides in pertinent part: The State plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

[4]HEW contended that this regulation was simply a statement of policy that it would not enforce the statute, 42 U.S.C. §1396a(a)(13)(E), until January 1, 1978. *See, Alabama Nursing Home Association v. Califano*, 433 F. Supp. 1325, 1330 (M.D. Ala. 1977).

The district court on January 5, 1978, granted, in part, a motion for summary judgment filed by the plaintiffs in the *Page* case. As part of its order, the district court adopted and incorporated by reference its decision in the *Golden Isles* case with regard to the rights of nursing home providers to be reimbursed on a reasonable cost-related basis. Accordingly, the court ordered that from October 18, 1977, prospectively, the *Page* nursing home providers were entitled to reimbursement on a reasonable cost-related basis. At that time, as in *Golden Isles,* the court reserved its decision regarding the question of retroactive relief.

On July 11, 1978, the district court consolidated *Page* and *Golden Isles.* The court then entered an order denying the claims of the nursing home providers for reimbursement prior to October 18, 1977, on the ground that such claims were barred by the eleventh amendment. The nursing home providers timely appealed this decision to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed the judgment of the district court regarding the claims of the nursing homes for reimbursement on a reasonable cost-related basis prior to October 18, 1977. The Fifth Circuit noted that Florida created the Department of Health and Rehabilitative Services with authority to enter into contracts and to sue and be sued in contract actions. *Fla. Stat. Ann.* §402.34 (West Supp. 1979).[5] The court then concluded that Florida had not only waived its general immunity from suit in its own

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[5] §402.34 provides in pertinent part: The Department is a body corporate. . . . It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess coporate powers for all purposes necessary to administer this chapter . . .

state courts by the promulgation of §402.34, but that it also waived its eleventh amendment immunity by drafting and executing a contract with each nursing home which outlined the precise obligations of the parties and which each nursing home signed as a prerequisite to its participation in the Medicaid program. The agreement bound both DHRS and the nursing homes to recognize and abide by all federal laws applicable to the Medicaid program.

On September 16, 1978, after HEW had approved a new reimbursement plan, the district court ordered that payment be made under the new plan from October 18, 1977, reserving for trial the question of whether the new plan met the statutory criteria of reasonable cost-related reimbursement.

Very recently, on July 29, 1980, the district court sent this new plan back to HEW for reconsideration because HEW's previous review concerning reasonable cost-related reimbursement was deemed insufficient under criteria recently announced by the Fifth Circuit in *Alabama Nursing Home Association v. Harris,* 617 F.2d 388 (5th Cir. 1980).

REASONS FOR DENYING THE WRIT

The Fifth Circuit, in its opinion below, correctly held that under the particular facts and circumstances of this case, Florida had waived its eleventh amendment immunity. Moreover, the principal case relied upon by Petitioner to support its position—*Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)—is readily distinguishable on its facts and is, therefore, not controlling.

In arguing that this Court should grant certiorari in the instant case, Petitioner asserts that the opinion below "effectively nullifies this Court's landmark decision" on

Edelman. (Pet. p. 11). Such an assertion by Petitioner, however, is without merit because *Edelman* is clearly distinguishable on its facts from the situation in the instant cause.

Edelman was an action brought by welfare recipients in Illinois against various state officials for administering the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with federal regulations and with the fourteenth amendment to the Constitution. More specifically, the plaintiffs in *Edelman* alleged that applications for welfare benefits were not being processed within the time frame set forth in the federal regulations and that, contrary to those regulations, the defendants were commencing payments only with the month in which an application was approved, and not making payments for prior eligibility months.

Unlike *Edelman*, which involved welfare payments in the nature of a dole to qualified individuals, the instant case involves compensation for services rendered pursuant to contract. In *Edelman*, the payment was in the nature of a gratuity. Whereas, in the instant case, Respondents who have already provided skilled nursing services pursuant to a contract with the state, are vested with a contractual right to compensation. Unlike the state defendants in *Edelman*, who did not enter into contracts with the recipients of the grant and who acted only as distributors of such grants, the Florida DHRS entered into written contracts with Respondents, which contracts must surely have implicitly provided for a mutuality of obligation and remedy. Thus, the instant case and *Edelman* represent two different situations.

In the instant case, the Fifth Circuit correctly concluded that the interaction and combination of various state actions supported the "overwhelming implication"

that Florida had indeed waived its eleventh amendment immunity.[6] The Fifth Circuit stated:

> While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, *Edelman*, supra, 415 U.S. at 673, 94 S.Ct. at 1361, the "overwhelming implication," id., 94 S.Ct. at 1361, of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity by requiring the DHRS to recognize and abide by all federal laws in participating in the Medicaid Program.
>
> 616 F.2d 1355 at 1363

The Florida legislature created the Florida Department of Health and Rehabilitative Services (DHRS)—the state agency responsible for the administration of Florida's Medicaid reimbursement program—as a "body corporate" with power to enter into contracts and to sue and be sued in actions sounding in contract. This power derives from Florida Stat. Ann. §402.34 (West Supp. 1979). This section provides in pertinent part:

> The Department is a body corporate.... It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess corporate powers for all purposes necessary to administer this chapter....

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[6]Contrary to Petitioner's argument (Pet. pp. 17-20), an express statutory waiver of eleventh amendment immunity is not essential to a finding of waiver. *See, e.g., Petty v. Tennessee—Missouri Bridge Commission*, 359 U.S. 275 (1959). Also, this Court in *Edelman* acknowledged that waiver of eleventh amendment immunity will be found when there is "such overwhelming implication from the text as [will] leave no room for any other *reasonable construction.*" 415 U.S. 651 at 675 (emphasis added; citations omitted).

It is obvious from the above quoted statute that the power given to DHRS by the Florida legislature is unrestricted. Florida thoughtfully preserved its tort immunity but waived, without limit its immunity to suits in contract.[7]

Florida DHRS, acting pursuant to its corporate powers, not only entered the Medicaid area, but also drafted and executed a contract with each Florida nursing home which was to provide services under the Medicaid program. The particular language in the contract was chosen by the state and the entire contract was presented on a "take it or leave it" basis to nursing homes willing to provide services under Medicaid. The sixth paragraph of this agreement required both the nursing home provider and DHRS to recognize and abide by all federal laws applicable to the Medicaid program. The contract, therefore, obligated DHRS to reimburse nursing home providers on a reasonable cost-related basis effective July 1, 1976, as required by 42 U.S.C §1396a(a)(13)(E). Although the nursing home providers rendered services as required by their contracts with DHRS, Florida DHRS failed to honor its

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[7]Petitioner makes the rather broad statement that this Court "has consistently held that a state statute consenting to suit against the state constitutes consent to be sued in state court, not federal court." (Pet. p. 16). However, a close examination of this Court's cases relied upon by Petitioner for its broad assertion reveals that all of the cases involved matters exclusively within the state domain and most involved suits for refund of state taxes bases upon state statutes. See, e.g., *Great Northern Life Insurance Company v. Read,* 322 U.S. 47 (1944); *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573 (1946). The district court cases, *Pharmacists Society of Milwaukee v. Department of Health and Social Services,* 79 F.R.D. 405 (E.D. Wis. 1978) and *Medicenters of America, Inc. v. Commonwealth of Virginia,* 373 F. Supp. 305 (E.D. Va. 1974), come somewhat closer to supporting the Petitioners' general rule, but even those cases do not involve a situation where a state agency with the power to sue and be sued and to contract has entered into, and then breached, contracts with health care providers.

obligation to make reimbursement for those services on a reasonable cost-related basis.

When DHRS entered into contracts for Medicaid services with nursing home providers, DHRS voluntarily submitted itself to the jurisdiction of the federal courts and thereby waived its eleventh amendment immunity. On the basis of the actions by DHRS, the Fifth Circuit properly concluded:

> By contracting with appellants [nursing home providers] to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws.
>
> 616 F.2d 1355 at 1363

Thus, the Fifth Circuit arrived at the only reasonable conclusion that could be drawn from the actions taken by the State of Florida in this case. Florida voluntarily participated in the Medicaid program with the knowledge that the program was a creature of the Congress of the United States subject to a wide range of federal courts to hear and determine questions arising under the Medicaid Act. When it contracted with nursing home providers in the manner described above, Florida DHRS knew that aggrieved nursing home providers in the Medicaid program would seek redress in federal district court for issues involving federal law. Assuming that it was contracting in good faith, Florida must have intended these contracts to have mutual obligations and mutual remedies. If the nursing homes had breached the Medicaid provider agreement, DHRS could seek any form of redress, including retroactive relief in federal court. It is reasonable to conclude, therefore, that Florida intended to waive its eleventh

amendment immunity so that the nursing home providers would be able to seek similar redress.

The Fifth Circuit correctly concluded that to construe the actions of Florida DHRS in any other manner "could operate to immunize state officers and the agency from their contractual duty to adhere to federal statutory requirements."[8] The court pointed out that:

> A contrary holding in the circumstances of this case, where appellants Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result.
>
> 616 F.2d 1355 at 1363

The inequity to which the Fifth Circuit referred is obvious. It is Florida's act of contracting with nursing home providers for services under the Medicaid law and, in fact, receiving those services while failing to comply with its obligation under federal law to pay providers on a reasonable cost-related basis. Florida's argument that DHRS' contract with the nursing home providers did not effect a waiver of eleventh amendment immunity is unreasonable because such an argument would not only permit, but would encourage the state to avoid its contractual obligations. Under its interpretation, Florida would be able to force the nursing home providers with whom it has contracted to split a single cause of action for damages for breach of contract between state and federal courts. The providers, seeking a definitive interpretation of federal law, would have to go into federal court to obtain such an interpretation, but could only obtain prospective relief in that forum. The providers would then have to file

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[8] 616 F.2d 1355 at 1363.

a separate lawsuit in state court to obtain retroactive relief. Clearly, such an interpretation of the contract and of Florida's intentions regarding the eleventh amendment issue is unreasonable. The only reasonable conclusion, indeed the "overwhelming implication," is that Florida voluntarily and intentionally waived its eleventh amendment immunity.

The Fifth Circuit, in its opinion below correctly analyzed the particular facts of this case and properly concluded that under the circumstances presented here Florida had waived its eleventh amendment immunity.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

BERNARD H. DEMPSEY, JR., ESQ.

HARRISON T. SLAUGHTER, ESQ.

A. THOMAS MIHOK, ESQ.
Dempsey & Slaughter, P.A.
Suite 610, Eola Office Center
605 East Robinson Street
Orlando, Florida 32801
(305) 422-5166

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-532

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A.J. TAYLOR, its Secretary,

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THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHAW & WARNER
Suites 607 & 611
New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone (305) 374-2633

Counsel for Respondents

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the State of Florida waived its Eleventh Amendment Immunity from suit in Federal Court by expressly inserting in its rule adopted, written Medicaid provider agreement that the State would recognize and abide by all federal laws, regulations and guidelines applicable to participation in and administration of the Title XIX joint Federal-State Medicaid Program?

II.

Whether a Federal Court in an action with a federal party defendant, has jurisdiction to determine the constitutional validity of a federal regulation even though a necessary State defendant has been named, and whether the Federal Court has the power to fully enforce its judgment against all

defendants including the necessary State defendant, notwithstanding the Eleventh Amendment?

PARTIES TO THE PROCEEDING

The parties are the Golden Isles Convalescent Center and other nursing home providers situate in the State of Florida individually and as part of a class, the Secretary of the Federal Department of Health and Human Services, and the petitioning Secretary of the State of Florida Department of Health and Rehabilitative Services.

STATEMENT OF THE CASE

In 1972, the Congress of the United States enacted Public Law 92-603, §249,

42 U.S.C. § 1396(a)(13)(E) which provided that:

> 42 U.S.C. sec. 1396a(a)(13)(E); Sec. 249, P.L. 92-603
>
> Sec. 1396a. State Plans for medical assistance--Contents
> (a) A State plan for medical assistance must--
> (13) provide--
> (E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary. (Emp. added)

This four year congressionally mandated delay in the implementation of a reasonable cost-related reimbursement plan was expressly intended to give the states ample forewarning and time to properly prepare for this form of reimbursement. Despite Congress' clear mandate, and despite the more-than-reasonable time to prepare, the Federal Department of Health and

Human Services promulgated and adopted an obviously invalid federal regulation providing that the Federal Department of Health and Human Services would not require the States to adopt a reasonable cost-related reimbursement plan until January 1, 1978.[1]

Accordingly, the Plaintiff - Respondent, Golden Isles Convalescent Center, et al., filed this federal law suit in October, 1976, to declare the federal reg-

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[1] 45 C.F.R. Sec. 250.30 (a)3(IV) which provided: The State plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

ulation unconstitutional and to further order the federal defendant to perform its statutory duty to make certain that the State of Florida was in compliance with Federal Medicaid Reimbursement law. As a necessary requirement of this federal law suit, against a federal defendant involving a federal question in a joint federal-state program, the State of Florida, Department of Health and Rehabilitative Services (DHRS), the single designated State agency for purposes of administration of the Medicaid program in Floirda, was named a party-defendant and was ordered to perform its lawful obligation to prepare and adopt a proper state medicaid plan approved by the federal defendant. Included in the Plaintiff's requests for relief, was a prayer that the defendants fully comply with the statutory require-

ment that as of July 1, 1976, all contracting Medicaid providers be reimbursed on a reasonable cost-related basis pursuant to a proper and lawful plan.

On October 18, 1977, the Honorable William M. Hoeveler of the United States District Court for the Southern District of Florida, ruled the federal regulation extending the date for implementation of a lawful cost-related reimbursement plan invalid.[2] The Court further ordered the federal defendant to certify to the Court whether the then current Florida Medicaid plan complied with federal reimbursement law. The federal defendant certified that it did not. Thereupon, the Court ordered the state defendant to submit a proper reimbursement plan to the federal defen-

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[2] That portion of the Order was not challenged on Appeal.

dant for review and approval. However, on July 7, 1978, the District Court denied reimbursement on a reasonable cost-related basis as of the July 1, 1976, the date of Congress' mandate on the theory that such relief constituted retroactive damages or "equitable relief" which was barred by the Eleventh Amendment. The District Court relied solely on this Court's five to four divided opinion in Edelman v. Jordan, 415 U.S. 651 (1974).

On appeal by the Plaintiffs - Respondents to the Fifth Circuit Court of Appeals on the issue of the denial of reasonable cost-related payments back to July 1, 1976, the Court unanimously reversed Judge Hoeveler and held that the State of Florida had expressly waived its Eleventh Amendment immunity via its statement in its rule adopted, written Medicaid Provider Agreement to recognize and abide

by federal law.

The State defendant is now petitioning the Court on this issue.

REASONS FOR THE DISALLOWANCE OF THE WRIT OF CERTIORARI

I.

Pursuant to Article X, Section 13 of the Florida Constitution, the Florida State Legislature enacted into law §409. 055 F.S. which provides that:

> BODY CORPORATE: The department is a body corporate and shall adopt and have a corporate seal. It shall have the power to contract and be contracted with, to sue and be sued in actions ex contracto, but not in torts, and to have and possess corporate powers for all purposes necessary to administer this chapter...

It is understood that this statutory authority alone, while clearly constituting a waiver of immunity in state courts, does not authorize a suit in Federal Court against

the State of Florida.[3]

However, the State of Florida did not stop there. Pursuant to its corporate authority, the State Department of HRS promulgated and lawfully adopted a Provider Agreement in its Medical Assistance Rules in Appendix I, Chapter 10C-7.06 Florida Administrative Code which expressly stated in the sixth paragraph of such Agreement that:

> Both the Provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

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[3] See Smith v. Reeves, 178 U.S. 436 (1900); Scott v. Board of Supervisors, 336 F.2d 557, (5th Cir 1964); Edelman v. Jordan, 415 U.S. 651, 678, n.19 (1974)

In addition in the fourth paragraph of such rule-adopted provider contract, it states that:

> In instances of non-payment or underpayment conditions due to error(s) not attributable to Provider who has furnished nursing home services and care to persons properly certified and eligible, the Single State Agency shall make payment to the Provider upon receipt of properly completed claims documents.

As a condition precedent to participation in the Florida Medicaid program, the Plaintiff - Respondents in this proceeding entered into this provider agreement with the State of Florida. This rule and contract were drafted soley by the State and as such, if any ambiguity did exist, such ambiguity should be construed against the drafter.[4]

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[4] Vans Agnew v. Ft. Meyers Drainage District, 69 F.2d 244 (5th Cir 1934) cert. denied 292 U.S. 643 (1934)

It is of course true that a State participating in the Title XIX Medicaid program must comply with federal law. However, contrary to the position of the petitioner, 45 C.F.R. §205.100 (a)(2)(ii) (1977) does not require any such statement of compliance to be put in the provider agreement. Such statement of federal legal compliance as adopted by the Florida Department of HRS went way beyond what was necessary. The intent and meaning of the compliance statement can only logically be construed by this Court as included for the express purpose of waiving the State's Eleventh Amendment immunity in Federal Court. In addition, it should be noted that there is no limitation stated in the agreement that compliance with federal law would be limited strictly to substantive and not procedural law as well.

Therefore, the Fifth Circuit was correct when it held that the overwhelming implication of paragraph 6 in the Medicaid Provider Agreement is that the state defendant intended to expressly waive its Eleventh Amendment immunity.

II.

In Edelman v. Jordan supra, the question was whether the Illinois Department of Public Aid's administration of a joint Federal and State welfare program conformed to federal law or otherwise whether it was in conflict therewith. There was no federal regulation declared invalid. There was no federal defendant served. There was no federal statute with a date on it, and of course, there was no express waiver of Eleventh Amendment immunity in a written contract adopted by the State.

In this lawsuit, all of the above mentioned factors were present. This action began as a federal constitutional challenge to a federal regulation which was adopted by the Federal Department of Health and Human Resources. Needless to say, the federal government was clearly an essential party to this litigation thus establishing the Federal Court as the proper forum within which to bring this action.[5]

Since the Florida Department of HRS was the single designated State Agency

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[5] Title 28 U.S.C. §1346 vests exclusive original jurisdiction in the District Court where the United States is a defendant. Stapelton v. Two-Million Four Hundred Thousand, One Hundred and Ten Dollars, 454 F.2d 1210 (3rd Cir 1972); Cert. denied 409 U.S. 894; McCall v. U.S., 338 F.2d 589 (9th Cir 1964), cert. denied 380 U.S. 974; Murphy v. Kodz, 351 F.2d 163 (9th Cir 1965)

in Florida required to administer Florida's Medicaid program, it was necessary to join the State as an indispensible party pursuant to Rule 19 F.R.C.P. Any other conclusion would lead to separate and cumbersome proceedings in a Federal Court against the Federal Government and redundant proceedings in a State Court action against the State. Such splitting of proceedings flies in the face of all modern needs for judicial economy and control and effectiveness of remedy. If however, this Court accepted the States' argument that this matter was subject to soley State court proceedings even when a federal regulation and a federal defendant are involved, the supremacy clause of the United States Constitution[6] would effectively be

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[6] United States Constitution Article VI

superseded by the Eleventh Amendment in that the Federal Government and its regulations effecting all fifty states would be at the mercy of a local state court. This can hardly be the intent of the adoption of the Eleventh Amendment.

This case is therefore uniquely distinguishable from Jordan v. Edelman, supra, since the central focus of the proceedings in that case was to review State conduct involving state officials. There was no juxtaposition of a federal cause of action with a federal party along with a state raising the issue of Eleventh Amendment immunity. In fact, the Petitioner has cited no cases where the Eleventh Amendment was raised as an issue when the federal government was named as an essential party along with a state defendant.

Furthermore, in Edelman, the award of damages granted by the lower court to the plaintiffs was undeniably retroactive in nature. In the case at bar, the payments sought are not retroactive but are in fact prospective under federal law. For a State plan to comply with the Order of the District Court of October 18, 1977, (and therefore Title 42 U.S.C. 1396(a)(13)(E)), the plan must provide for reasonable cost-related payments effective July 1, 1976. That is what the law expressly states and requires and any plan which is not effective as of that date would be in violation of the law and could not be approved by HHS by federal legislature mandate. It follows therefore that payment for the period of July 1, 1976 through October 17, 1977 is a necessary consequence of complying with Title 42 U.S.C. §1396(a)(13)(E) statutory law as well as the federal

District Court's Order and that such payment does not constitute retroactive relief. As such, neither the Eleventh Amendment nor this Court's holding in Edelman v. Jordan act as a bar to reasonable cost-related reimbursement as of July 1, 1976.

CONCLUSION

The Petitioner points out that "millions and millions of dollars are potentially involved." While this is true, this does not excuse the Petitioner from its unlawful conduct. Indeed, those millions of dollars are ones which the respondents have already spent upon their reliance that the State would comply with the law. Since the program in Florida is strictly cost oriented, only actual allowable costs, subject to audit, already spent by providers would be reimbursed.

There would be no windfall to anyone. In fact, it is worthy to note that the Federal Department of Health and Human Services' invalid delaying regulation which attempted to assist the States was promulgated and adopted only shortly after this Court made its ruling in Edelman v. Jordan. In this case, it was not only the State but the Federal Government, who pays over 50% of the Medicaid reimbursement, who teamed up to defeat the rights of providers under this Court's Edelman v. Jordan sanction. Certainly, HHS and the States had this Court's ruling in mind at the time. To rule now that the Respondents cannot maintain this action in Federal Court would have the ignoble effect of bringing to fruit Justice Thurgood Marshall's and Justice Harry Blackmun's opinion where in dissent Justice Marshall

stated his fear of, "the spectre of a State, perhaps voluntarily, defying Federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." Edelman v. Jordan, supra, at 692, (1974)

Respectfully submitted,

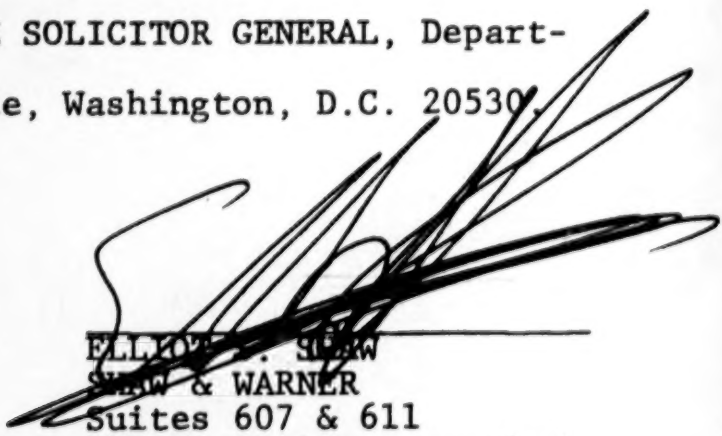
SHAW & WARNER
Suites 607 & 611
New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone (305) 374-2653

BY: _____
ELLIOT S. SHAW
Counsel for Respondents

On the brief:
Elliott S. Shaw
Eric P. Littman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 1980, three copies of the Brief in Opposition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed to: M. STEPHEN TURNER, ESQ., P. O. Box 10261, 600 Lewis State Bank Bldg., Tallahassee, Fl., 32302; A. THOMAS MIHOK, ESQ., 5458 Woodcrest Drive, North Orlando, Fl., 32807; and THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.



ELLIOT H. SHAW
SHAW & WARNER
Suites 607 & 611
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone: (305) 374-2633

Counsel for Respondents

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No. 80-532

In the Supreme Court of the United States

OCTOBER TERM, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AND A. J. TAYLOR, SECRETARY OF THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, PETITIONERS

v.

FLORIDA NURSING HOME ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

WADE H. MCCREE, JR.
Solicitor General
ALICE DANIEL
Assistant Attorney General
WILLIAM KANTER
ROBERT S. GREENSPAN
Attorneys
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

QUESTION PRESENTED

Whether Florida, in its contractual agreement with respondent nursing homes, waived its sovereign immunity from suit in federal court for money damages.

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The opinion of the court of appeals (Pet. App. 1–28) is reported at 616 F.2d 1355. The opinion of the district court (Pet. App. 31–33) is not reported. A related opinion of the district court (Pet. App. 34–40) is reported at 442 F. Supp. 201.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1980. A petition for rehearing was denied on July 22, 1980 (Pet. App. 29–30). This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. In 1972 Congress amended the Medicaid Act to require that state medical assistance plans under the statute provide for payment "on a reasonable cost related basis" for services rendered by a skilled nursing facility or an intermediate care facility, as those terms are used in the Act. 42 U.S.C. 1396a(a) (13) (E). Previously, states participating in the Medicaid program were permitted to reimburse provider facilities for such services on either a "flat rate" basis or a cost-related basis, as prescribed by the relevant state authority, and there was no federal statutory standard to ensure that the amounts actually paid were reasonably related to the reasonable costs of the services rendered. See S. Rep. No. 92–1230, 92d Cong., 2d Sess. 287–288 (1972).[1]

[1] As the Secretary of Health, Education, and Welfare explained when he issued regulations implementing the 1972 amendment,

> the [Senate] Committee was concerned about the effect of both underpayment and overpayment on the quality of medical care of recipients. If facilities are underpaid, be-

Under the 1972 amendment, the new Medicaid reimbursement standard for skilled nursing facilities and intermediate care facilities was to become effective on July 1, 1976. This effective date appears in 42 U.S.C. 1396a(a) (13) (E) and was the product of a conference committee compromise that postponed the effectiveness of the new provision until two years after the date initially proposed by the Senate. H.R. Conf. Rep. No. 92-1605, 92d Cong., 2d Sess. 56-57 (1972). Although Congress thus provided nearly four years' lead time before the cost-related reimbursement requirement was to become operative, the Secretary of Health, Education, and Welfare did not promulgate proposed implementing regulations until April 13,

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cause a State's flat rate is unrealistically low or because in determining its rate the State refuses to recognize as allowable costs some of the real costs of providing the services, facilities will be under pressure to cut corners and provide lower quality care, or will be forced to make their non-Medicaid patients absorb some of the cost of Medicaid patients' care; at worst, facilities may refuse to accept Medicaid patients. If facilities are overpaid, either because the State's flat rate is unrealistically high or because the State payment formula permits reimbursement for unnecessary items such as luxury services, questionable depreciation allowances and the like, there is little incentive for providers to employ the most efficient and economical methods of providing services, with the result that the State's Medicaid dollars do not go as far as they could to provide needed medical care. When increased inflation and unemployment are already straining State welfare budgets, this is a serious consideration. The rising costs of the Medicaid program may force a State to drop optional services or the medically needed category from its plan, as some States have already done; at worst, the high prices of medical care and services in skilled nursing facilities and intermediate care facilities might be a factor in the State's decision to drop out of the Medicaid program altogether.

41 Fed. Reg. 27300 (1976).

1976, only 11 weeks before the statutory effective date. See 41 Fed. Reg. 15560.

After receiving and considering comments from several hundred interested parties, including 20 states, the Secretary published his final regulations on July 1, 1976, the day the congressionally prescribed reimbursement method became mandatory. 41 Fed. Reg. 27300. At that time, the Secretary responded to state complaints about the tardiness of his regulations by announcing that no administrative enforcement measures would be undertaken against states that reimbursed skilled nursing facilities and intermediate care facilities according to reasonable cost-related payment rates effective no later than January 1, 1978. The relevant regulation states:

> The State [Medicaid] plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

45 C.F.R. 250.30(a) (3) (iv) (1976). In his commentary accompanying the final regulations, the Secretary explained (41 Fed. Reg. 27305 (1976)):

> A considerable number of States have expressed concern regarding the timetable for implementation of these regulations. The Department is aware that, although a good number of States will be able to implement the greater part of these regulations fairly quickly, some will need a good deal of time to begin to accumulate the cost data on which to base payment rates, and none will be able to meet all the requirements as of July 1, 1976. The Department does not intend that States should be penalized for the Department's delay in publishing final regulations. Therefore,

the regulations require that the initial cost-reporting period begin no later than January 1, 1977, and that States set reasonable cost-related rates no later than January 1, 1978, on the basis of cost data submitted by providers. The States are encouraged to meet each requirement of the regulations as soon as possible.

2. On March 8, 1977, the respondent nursing home association and individual nursing homes filed this action in the United States District Court for the Southern District of Florida against petitioners and the Secretary of Health, Education, and Welfare. Respondents contended that the Secretary's regulation concerning the timetable for implementation of the cost-related reimbursement requirement was inconsistent with the statutory directive that that requirement take effect on July 1, 1976. They sought declaratory and injunctive relief and, in addition, retroactive payments, on a "reasonable cost-related basis," for the period beginning July 1, 1976.

When the complaint in the present case was filed, a similar suit, brought by the same nursing homes in October 1976, was already pending in the district court. In October 1977, the district court ruled in this other case that the Secretary's regulation was inconsistent with the 1972 statutory amendment and was therefore invalid "insofar as it sets an effective date other than July 1, 1976." Pet. App. 37, reprinting *Golden Isles Convalescent Center, Inc.* v. *Califano*, 442 F. Supp. 201 (1977).[2] The court reserved the question whether plaintiffs in *Golden Isles* were entitled to recover reimbursement on a reasonable cost-related basis during the period between July 1976 and October 1977.

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[2] The district court adopted the reasoning in *Alabama Nursing Home Ass'n* v. *Califano*, 433 F. Supp. 1325 (M.D. Ala. 1977), another case involving a challenge to the Secretary's regulation on statutory grounds.

Subsequently, the district court granted partial summary judgment in the present case on the basis of its earlier decision in *Golden Isles*.[3] The court ordered that respondent nursing homes should receive reimbursement on a reasonable cost-related basis beginning on October 18, 1977, the date of the partial summary judgment order in *Golden Isles*. The court again reserved the question whether the nursing homes were entitled to retroactive reimbursement on a reasonable cost-related basis for the period from July 1976 to October 1977.

In July 1978, the district court consolidated *Golden Isles* and the present case "insofar as the issues as to 'reasonable cost related basis' are concerned" (Pet. App. 32). The court then ruled that the plaintiff nursing homes in the two cases could not recover retroactive payments on a reasonable cost-related basis for the period before October 18, 1977, because "such claims are barred by the 11th Amendment" (Pet. App. 32–33). In support of this decision, the district court relied on *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

The court of appeals reversed (Pet. App. 21–28). The court ruled that "Florida has waived its Eleventh Amendment immunity by consenting to be sued in federal court under the terms of its contracts" with respondent nursing homes (*id.* at 22). The court acknowledged (*id.* at 24) that, under *Edelman* v. *Jordan*, *supra*, the Eleventh Amendment bars retroactive monetary claims in federal court against a state or its agencies, in the absence of specific consent to be subject to such suits. The court of appeals found such consent, however, in the following paragraph of Florida's standard agreement with Medicaid providers:

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[3] This order is not reproduced in the petition, but it was apparently entered in January 1978.

> Both the provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

The court explained (Pet. App. 26–27):

> By contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws.

The court further stated (*id.* at 27–28) that a contrary holding in this case "would achieve an inequitable result."[4]

DISCUSSION

1. The federal government has little or no direct interest in the outcome of the present litigation. Because the district court granted partial summary judgment on October 18, 1977, and the Department of Health, Education, and Welfare was, in any event, scheduled to begin full enforcement of the reasonable cost-related reimbursement requirement on January 1, 1978, the Secretary did not appeal the district court's ruling, and, consequently, the validity of the Secretary's regulation was not at issue before the Fifth Cir-

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[4] The court of appeals also rejected petitioners' appeal from the partial summary judgment granted to respondent nursing homes with respect to Florida's obligation under the Medicaid Act immediately to begin reimbursement on a reasonable cost-related basis. See Pet. App. 7–21. Petitioners sought further review of this aspect of the court of appeals' decision, and their petition for a writ of certiorari (No. 80–85) was denied on October 6, 1980.

cuit.[5] Moreover, even if petitioners are required to make retroactive payments on a reasonable cost-related basis from the period from July 1976 to October 1977, the federal government will not be obligated to contribute to such payments. Under the HEW Appropriations Act for fiscal year 1977, federal contribution toward the Medicaid expenses of participating states is available only with respect to those expenses covered by an approved state Medicaid plan submitted no later than the quarter for which federal reimbursement is sought.[6]

In the present case, Florida did not submit a plan providing for reimbursement of respondent nursing homes on a reasonable cost-related basis until the State was ordered to do so by the district court in October 1977. Accordingly, for the five quarters beginning July 1, 1976 and ending September 30, 1977, the Florida Medicaid plan did not include any such feature, and, under the relevant federal appropriations

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[5] Petitioners' appeal from the partial summary judgment entered by the district court primarily concerned jurisdictional matters and the propriety of injunctive relief against the State. Petitioners did not argue in the court of appeals that the Secretary, by regulation, could properly postpone an effective date prescribed by Congress.

[6] The relevant statutory provision is found in Title II of the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, 90 Stat. 1429. It provides that, in the administration of several cooperative federal-state programs under the Social Security Act, including the Medicaid program,

> payments to a State * * * for any quarter in the period beginning July 1, 1976, and ending September 30, 1977, may be made with respect to a State plan approved * * * prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

legislation, no federal funds are available to pay for items not specified in the state plan.[7] If the court of appeals' decision is permitted to stand, Florida alone will bear the burden of paying respondent nursing homes the difference between the flat rate previously in effect for services rendered between July 1, 1976 and September 30, 1977, and the "reasonable cost-related" rate that the court of appeals has ordered to be applied retroactively to that period.[8]

2. We believe, however, that the court of appeals' ruling is clearly incorrect. The court's finding that the contract language reproduced above (see page 6, *supra*) waived Florida's sovereign immunity under the Eleventh Amendment is contrary to the ordinary meaning of the words employed and is inconsistent with this Court's injunction in *Edelman* v. *Jordan*, *supra*, 415 U.S. at 673, that such waivers be found "only where stated 'by the most express language or

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[7] In response to the district court's order of October 18, 1977, Florida submitted to the Secretary on December 12, 1977, a proposed plan incorporating the reasonable cost-related reimbursement requirement. The Secretary approved the plan on April 26, 1978. HEW appropriations for the month of October 1977 were provided by a joint resolution that simply continued in effect the provisions of the appropriations act for the previous fiscal year. See Pub. L. No. 95-130, 91 Stat. 1153. Accordingly, since the Florida plan that was subsequently approved was submitted before the end of the first quarter of fiscal year 1978, federal contribution would presumably be available for whatever retroactive payments Florida may be required to make for the period from October 1, 1977 to October 18, 1977. This is the extent of the federal financial interest in the current litigation.

[8] Florida will not be absolved of this obligation by the unavailability of federal contribution. In that sense, the present case is unlike *Harris* v. *McRae*, No. 79-1268 (June 30, 1980).

Here, Congress has specifically directed that skilled nursing facilities be paid on a reasonable cost-related basis for services rendered under the Medicaid program. Congress made this requirement effective on July 1, 1976, and appropriated funds for

by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'" (quoting from *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). Moreover, the court of appeals' decision completely ignores the plain restrictions on the way in which waivers of sovereign immunity may be accomplished under Florida law and the presumption against such waivers arising from recent congressional action on the subject.

The contractual provision on which the court of appeals relied states only that the State and the Medicaid provider agree to "recognize and abide by" federal

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Medicaid purposes. Those funds would have been available for federal contribution to state nursing home payments calculated on a reasonable cost-related basis, if only Florida had provided for such payments in its Medicaid plan. Although the Secretary, in his final regulations promulgated on July 1, 1976, deferred administrative enforcement of the reasonable cost-related reimbursement rquirement until January 1, 1978, he encouraged participating states to comply with that requirement as quickly as possible (see page 4, *supra*). He did not and could not modify the terms of Congress' appropriations legislation to permit retroactive federal contribution in situations like the one presented in this case.

By contrast, in *McRae*, Congress simply decided that, regardless of the provisions of state Medicaid programs, no federal contribution would be available for most abortions. Under these circumstances, where Congress has decided not to provide any funding at all for particular services, the federal government argued, and the Court agreed (slip op. 8–11), that Congress could not have intended to require states to bear the full cost of such services as a condition of participating in the Medicaid program. The situation considered in *McRae* is quite different from the one now before the Court, in which Congress explicitly directed that certain Medicaid payments be made on a specified basis but also enacted an appropriations measure of general applicability conditioning the availability of federal contribution for any particular Medicaid expenditures on the inclusion of an appropriate provision governing those expenditures in state Medicaid plans.

laws and regulations governing the Medicaid program. These words cannot reasonably be thought to imply a waiver of sovereign immunity from damages actions in federal court, much less to imply such a waiver under the strict standard of *Edelman*.

The court of appeals' decision becomes even more dubious when viewed in light of the Florida constitutional provision that permits consent to suit against the State to be given only by statute. See Pet. 6, 17-20. No such statutory consent was given in this case.[9] Although the provisions of state law may not, by themselves, be dispositive of the question whether a state participating in a federally-created cooperative program has waived its sovereign immunity with respect to that participation, the state law requirements for an effective waiver are surely entitled to substantial evidentiary weight on the matter.

In addition, Congress at one time required a waiver of sovereign immunity with respect to certain claims as a condition of a state's participation in the Medicaid program. See Section 111 of Pub. L. No. 94-182, 89 Stat. 1054, requiring state Medicaid plans to include a waiver of any Eleventh Amendment immunity from suits brought by providers of in-patient hospital services. This provision was repealed in October 1976, less than one year after it became effective (see Pub. L. No. 94-552, 90 Stat. 2540), and the repeal was made retroactive to January 1, 1976, the original date of the waiver requirement.

The House committee report accompanying the repealing legislation explained that the waiver require-

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[9] A Florida statute does permit the petitioner Department of Health and Rehabilitative Services to be sued in state court (see Pet. 6, 16), and respondent nursing homes have also filed a suit in the appropriate Florida circuit court seeking retroactive reimbursement on a reasonable cost-related basis for the period

ment had created widespread apprehension among states participating in the Medicaid program that they would be subject to "an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make effective program administration virtually impossible." H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. 4 (1976). Such consequences would be no less likely to arise from a waiver of Eleventh Amendment immunity in the present context, and it is therefore highly improbable that Florida would have voluntarily waived its immunity from suit by providers of Medicaid nursing services.

3. Although we believe the court of appeals' decision is unsupportable, it involves only the construction of one state contractual provision under the Medicaid program. The time period concerned is only 15 months, and the amount of money at stake is only the difference between one Medicaid payment rate and another. The court of appeals purported to follow the fundamental principles established in *Edelman* v. *Jordan*, *supra*, and merely found a waiver of sovereign immunity based on particular contract language in a particular statutory and regulatory context. Under these circumstances, plenary review by this Court may not be warranted.

On the other hand, if the court of appeals' decision is permitted to stand, it may encourage other unjustified findings of Eleventh Amendment waivers by federal courts in the Fifth Circuit and elsewhere. The temptation to reach such an erroneous result is likely to be particularly strong when a court concludes, as the court of appeals did in this case, that it must find a waiver of sovereign immunity in order to avoid "an inequitable result" (Pet. App. 28). And, of course, if the

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from July 1, 1976 to October 18, 1977 (see Pet. 26 & n. 15). That proceeding is apparently being held in abeyance pending the outcome of the federal litigation.

decision below remains undisturbed, Florida will be required to pay sums for which it did not consent to be liable, and there may well be further litigation between the State and the federal government regarding the State's right to federal contribution for the additional Medicaid payments that will have to be made to respondent nursing homes.

Accordingly, the Court may wish to consider summary reversal in this case. The respondent nursing homes and nursing home association, in their briefs in opposition, have not offered any additional support for the court of appeals' ruling, and this Court's consideration of the disputed one-sentence contractual provision is not likely to be appreciably aided by further briefing and argument. Moreover, if the court of appeals' ruling is promptly reversed, it will avoid the potential necessity for states participating in the Medicaid program to amend their contractual agreements with providers to make plain that general commitments to abide by federal law and regulations do not imply consent to suits for retroactive monetary relief in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court may wish to consider summary reversal.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
ROBERT S. GREENSPAN
Attorneys

DECEMBER 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-532

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary,

Petitioners,

v.

FLORIDA NURSING HOME ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF

M. STEPHEN TURNER
Culpepper, Beatty & Turner
Post Office Box 10261
600 Lewis State Bank Bldg.
Tallahassee, Florida 32302
(904) 222-4945

Counsel for Petitioners

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners provide the Court with a reproduction of Florida Attorney General's Opinion 080-77 as Appendix I to this Brief. This recently released Opinion supplements the authorities on pages 17-20 of the Petition regarding the requirement for a statute to explicitly waive Florida's immunity from suit in federal court for retroactive damages. Petitioners were unaware of this Opinion at the time the Petition was filed and became aware of it through reading Florida Law Weekly, No. 40, dated October 17, 1980, page 39, summarizing recently released Attorney General's Opinions.

Florida Attorney General's Opinion 080-77 advised the Governor that he could not, by agreement with the U.S. Secretary of the Interior, waive the sovereign immunity of the State of Florida against suit by private parties in federal court for disclosure of

privileged information about oil and gas reserves adjacent to the state's seaward boundaries made available to the state under the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331).

By analysis of historic constitutional provisions and long-standing Florida case law, including the cases cited on page 18 of the Petition, the Florida Attorney General emphasized that the power to waive Florida's immunity from suit in federal court is vested exclusively in the Legislature and that absent legislation specifically authorizing waiver of that immunity, neither the Governor nor any state agency can waive it by contract or otherwise. The Opinion states in pertinent part:

"In Suits v. Hillsborough County, 2 So.2d 353 (Fla. 1941), the Florida Supreme Court stated that '[t]he only way that the State can give its consent to be made a party defendant to a suit is by legislative act...' Florida courts have frequently interpreted the language of SS 13 of Art. X, State Const., as continuing absolute sovereign immunity for the state absent waiver by legislative enactment or constitutional amendment. (citations omitted.) Further, such waiver of sovereign immunity must be effectuated by a general law of the Legislature, such waiver cannot be accomplished by special or local law. (citations omitted.) Therefore, the power to waive the state's sovereign immunity is vested exclusively in the Legislature. If only the Legislature has the constitutional authority to waive the state's sovereign immunity, it necessarily follows that neither the Governor nor any other state agency or officer can waive the state's sovereign immunity, by contract or otherwise, absent specific legislative authorization therefor in the form of a general law.

* * *

> The Florida Constitution requires specific, clear and unambiguous language in a statute in order to waive the sovereign immunity of the state. See, Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978). Furthermore, the power of the state to contract is a legislative prerogative and any residual power or authority not expressly provided or limited by the State Constitution is vested in the legislative branch. (citations omitted.) The Governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant, and therefore the Governor and other executive officers of the state have no general or inherent authority to contract in the state's behalf or to waive the sovereign immunity of the state and they can bind the state by contract only within the power specifically conferred on them by law. (citations omitted.)"

Of course, there is no statute in Florida specifically authorizing Petitioners to waive the state's immunity from suit in federal court by provider agreement or otherwise.

Thus, the opinion below, which fails to defer to state law on the question of consent[1], allows federal courts to usurp the prerogative of state legislatures throughout the country to decide whether to waive their State's Eleventh Amendment immunity.

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[1] Alabama v. Pugh, 483 U.S. 783, 57 L.Ed.2d 1115, 98 S.Ct. 3057 (1978), looked to Alabama law to determine that consent to sue that state in federal court could not be given. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), held that a state attorney general could not waive the state's eleventh amendment immunity unless he had been properly authorized by state law to do so:

> "[We do not] think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that state officer power to consent to suit against the state in courts when the state has not consented to suit." Id.,at 468.

Respondent nursing homes create the impression that they will not be paid for their services unless retroactive damages are awarded. This is untrue. Petitioners pay nursing homes in the program on a prospective basis. Rates for every facility are set in advance. Each home knows what it will be paid before it renders any services. The provider is free to accept that rate as payment or to withdraw from the program. As stated in Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare, 602 F.2d 150, 153-54 (8th Cir. 1979):

> "Participation by a nursing home as a provider of health care services to Medicaid recipients is voluntary. If appellants find that the reimbursement rates are insufficient, then they may either make their homes more efficient and economical or terminate their relationship with Medicaid and no longer accept Medicaid recipients as residents."

Respondent nursing homes were paid during the period prior to October 1977 under the previous reimbursement plan, which was not "cost-related" because the ceiling rates (caps) were legislatively set and thus not related to the median or some other percentile of per diem costs. However, all rates were set in advance, and providers were not locked into the program by virtue of the provider agreement and were obligated to accept amounts paid under the plan as payment in full. See Briarcliff Haven, Inc. v. Department of Human Resources, Ga., 403 F.Supp 1355, 1362-63 (N.D. GA 1965):

"Providers of services are not required to participate in a state's Medicaid program, but if they do choose to participate, they must agree to accept payment in accordance with the state plan provisions. According to 45 C.F.R. §§ 25.30(a)(6), the state plan must provide for limiting participation in the program to providers of services who accept, as payment in full, the amounts paid in accordance with the state's established fee structure. If a qualified provider believes that it is able to collect higher fees by not participating in the Medicaid program, it need not choose to participate. The Medicaid program is not designed to protect providers from the consequences of their business decisions or from business risks."

Respondent nursing homes say it would be inequitable if federal court jurisdiction did not exist to award retroactive damages. The proper remedy for the nursing home providers was to bring a suit for mandatory injunctive relief as soon as they had cause to believe that Florida was not going to implement a new plan on July 1, 1976. The nursing home industry is in close touch with departmental personnel, and it was not difficult to discern that the State was not in any position to implement a new plan, especially since HEW regulations were not even promulgated until June 30, 1976. See 41 Fed.Reg. 27300-27308.

In any event, an appellate court's impression of equity[2] is not probative of whether jurisdiction exists. Federal court jurisdiction rests on whether necessary prerequisites have been met: in this case, whether the State had explicitly consented under requirements of State law to federal court jurisdiction to award retroactive damages.

The perception of the opinion below by respondent nursing homes provides ample basis for this Court's review. If federal court

---

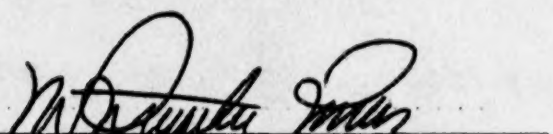
2 Since the district court found no jurisdiction to award retroactive damage, the question of whether it would be equitable to award such damages was not decided nor presented as an issue in the case on appeal. Hence, the analysis required to be performed if in fact there were jurisdiction was not before the Court. See Owens v. Roberts, 377 F.Supp. 45, 58-59 (M.D. Fla. 1974)(3-judge panel).

Incidentally, the West Reporter citation to Owens v. Roberts was not given when that case was cited in footnote 18 on page 30 of the Petition. The citation in that footnote should have been to 377 F.Supp. at 59-60.

jurisdiction to award retroactive damages against states in private party suits is now based on notions of equity, federal courts can capriciously intervene in the fiscal affairs of the States in total disregard of their Eleventh Amendment rights.

Respectfully submitted,

CULPEPPER, BEATTY & TURNER
Post Office Box 10261
600 Lewis State Bank Bldg.
Tallahassee, Florida 32302
(904) 222-4945

BY: 
M. STEPHEN TURNER

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 1980, three copies of Petitioners' Reply and Supplemental Brief were mailed, postage prepaid, to ELLIOTT SHAW, ESQUIRE, Suite 611, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132; A. THOMAS MIHOK, ESQUIRE, 5458 Woodcrest Drive, North, Orlando, FL 32807; THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530; and JIM R. BRUCE, II, Special Assistant Attorney General of Mississippi, Post Office Box 220, Jackson, Miss., 39205; TYRONE C. FAHNER, Attorney General of Illinois, 160 North LaSalle Street, Suite 900, Chicago, Illinois 60601; SCOTT A. SMITH, Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Mass. 02108; and WILLIAM P. MARSHALL, Assistant Attorney General of Minnesota, 515 Transportation Building, St. Paul, Minn. 55155; Attorneys for the Amici.

Attorney

APPENDIX I

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

September 11, 1980

JIM SMITH
Attorney General
State of Florida

080-77

The Honorable Bob Graham
Governor, State of Florida
Office of the Governor
The Capitol
Tallahassee, Florida 32301

Re: GOVERNOR--SOVEREIGN IMMUNITY--state may waive immunity only by a general act of the Legislature. Art. X, §13, State Const.; 43 U.S.C. §1331, et seq. (1979).

Dear Governor Graham:

This is in response to your request for an opinion on substantially the following question:

MAY THE GOVERNOR WAIVE THE SOVEREIGN IMMUNITY OF THE STATE BY CONTRACT WITH THE UNITED STATES GOVERNMENT?

The outer Continental Shelf (OCS) Lands Act, as amended on September 18, 1978, 43 U.S.C. §1331, et seq. (1979), makes available to coastal states certain privileged and proprietary information concerning oil and gas reserves located adjacent to the states' seaward boundaries. Section 1345(e) of the Act authorizes the Secretary of the Interior to enter into cooperative agreements with affected states pertaining to such matters, among other things, as the sharing of this privileged and proprietary information. Section 1325(c) requires the Secretary to prescribe regulations which assure the maintenance of the confidentiality of the privileged or proprietary information. Subsection (e) of §1352 requires that prior to the transmittal of any privileged information or granting the state access thereto, the Secretary of the Interior

and the Governor of the affected state enter into a written agreement in which the state agrees as a condition precedent to receiving or being granted access to such information that the state waive certain defenses specified in subsection (f) of §1352, and to hold the United States harmless from any violations of the regulations prescribed by the Secretary of the state or its employees may commit. The defenses the state must waive as a condition precedent as specified in subsection (f) are any claim of sovereign immunity and "any claim that the employee who revealed the privileged information which is the basis of such suit was acting outside the scope of his employment in revealing such information." Subsection (f)(1), further provides that whenever an employee of the state or federal government reveals confidential or

proprietary information in violation of the regulations prescribed by the Secretary that the lessee or permittee may commence a civil action for damages in the appropriate federal court against the United States or the state. The copy of the agreement you submitted along with your request incorporates these statutory requirements. You question whether the Governor has the authority, absent specific legislative authorization, to waive the sovereign immunity of the state.

The doctrine of sovereign immunity is a general principle of jurisprudence handed down to us from the common law of England. The principle that the sovereign cannot be sued without its consent applies with equal force to the several states of the Union. See, 72 Am.Jur.2d States §99 (1974); State ex rel. Davis v. Love, 126 So. 374 (Fla.

1930). In 81A C.J.S. States §298 (1977) at page 942, it is stated that "[i]t is a well established rule of law that a state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent in its own courts, nor can it, under the principle of sovereign immunity, be sued without its consent in the courts of a sister state or elsewhere."

Therefore, unless the State of Florida has waived or consents to waive its sovereign immunity, the state cannot be sued by a private party either in state or federal courts. See, Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971); Seaboard Airline Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5th Cir. 1958); Washington v. Brantley, 352 F.Supp. 559 (M.D. Fla. 1972). In Seaboard Airline Railroad Co. v. Sarasota-Fruitville

Drainage District, the Fifth Circuit Court of Appeals concluded that an indemnity agreement between the drainage district and the railroad company was void and could not be enforced because the state had not authorized the district to enter into such an agreement. Cf., §161.101(3), F.S., which authorizes the Department of Natural Resources to enter into indemnification agreements with "federal, state, and other local governments and political entities, or any agencies or representatives thereof, for the purpose of improving, furthering, and expediting the beach and shore preservation program."

While a state's sovereign immunity is subject to limitations which arise from the federal nature of the United States and a state may be sued in a federal court by the United States Government or a federal agency or

instrumentality,[1] no question involving this complex federal-state interrelationship is raised. The contractual agreement between the Department of Interior and the State of Florida provides, and §1352 of the OCS Lands Act requires that the lessee or permittee who supplied the privileged information may commence a civil suit for damages against the federal government or the state if such information is revealed and that the state waive its defense of sovereign immunity and the defense that the employee who revealed the information was acting outside the scope of his employment in revealing such information in a suit commenced against the federal government or

---

[1] See, Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966); Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934).

the affected state. 43 U.S.C. §1352(e) and (f) (1979). See, Palmer v. Ohio, 248 U.S. 311, 40 S.Ct. 16, 63 L.Ed. 108 (1918), in which the Supreme Court stated that the right of a private individual to sue a state in either a federal or state court cannot be derived from the Federal Constitution or laws of the United States, but can only come from the consent of the state; and see, Seaboard Airline Railroad Co. v. Sarasota-Fruitville Drainage District, supra. Article X, §13, of the State Constitution, Formerly Art. III, §22, State Const. 1885, provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The well-established principle of expressio unius est exclusio alterius is applicable to this constitutional provision. This principle requires that when

the constitution expressly provides the manner in which a thing is to be done, then it impliedly prohibits the thing from being done in a different manner. While the constitution does not in express terms prohibit the doing of a thing in a different manner, the fact that the constitution has prescribed the manner in which the subject matter shall be done is itself a prohibition against a different manner of doing it. See, In re Advisory Opinion of Governor Civil Rights, 306 So.2d 520 (Fla. 1975); State ex rel. Davis v. Love, 126 So. 374 (Fla. 1930); Weinberger v. Board of Public Instruction of St. Johns County, 112 So. 253 (Fla. 1927). A number of judicial decisions have expressly ruled on this constitutional provision, or its identical predecessor in the 1885 Constitution. See, Circuit Court of Twelfth Judicial Circuit v.

Department of Natural Resources, 339 So.2d 1113 (Fla. 1976); Davis v. Watson, 318 So. 2d 169 (Fla. 1975); Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968); State ex rel. Davis v. Love, 126 So. 374 (Fla. 1930); Hampton v. State Board of Education, 105 So. 323 (Fla. 1925).

In Suits v. Hillsborough County, 2 So.2d 353 (Fla. 1941), the Florida Supreme Court stated that "[t]he only way that the State can give its consent to be made a party defendant to a suit is by legislative act . . . ." Florida courts have frequently interpreted the language of §13 of Art. X, State Const., as continuing absolute sovereign immunity for the state absent waiver by legislative enactment or constitutional amendment. See, Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, supra; Spangler v. Florida State

Turnpike Authority, 106 So.2d 421 (Fla. 1958); Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959). Further, such waiver of sovereign immunity must be effectuated by a general law of the Legislature, such waiver cannot be accomplished by special or local law. See, Arnold v. Shumpert, supra; State ex rel. Davis v. Love, supra; Davis v. Watson, supra. Therefore, the power to waive the state's sovereign immunity is vested exclusively in the Legislature. If only the Legislature has the constitutional authority to waive the state's sovereign immunity, it necessarily follows that neither the Governor nor any other state agency or officer can waive the State's sovereign immunity, by contract or otherwise, absent specific legislative authorization therefor in the form of a general law.

The courts are without jurisdiction over suits commenced against the state for breach of contract, unless the state has given its consent. See, e.g., Cone v. Wakulla County, 197 So. 536 (Fla. 1940); Hampton v. State Board of Education, 105 So. 323 (Fla. 1925). In Hampton v. State Board of Education at page 328, the Florida Supreme Court stated that "where the suit involves a contract or property right of the state . . ., [such suit] cannot be maintained in so far as it affects property rights of the state, or seeks to enforce a contract made by or for the state, unless the consent of the state be duly given." In Venezia A, Inc. v. Askew, 363 So.2d 367 (1 D.C.A. Fla., 1978), the court dismissed an action brought against the Governor for damages for breach of contract holding that the doctrine of sovereign immunity barred recovery. In AGO

78-20, my predecessor in office determined that in the absence of a general law which authorizes a state agency to enter into an indemnification agreement which imposes liability on the state, such contracts are nugatory and unenforceable against the state or its agencies. See also, Seaboard Airline Railroad Co. v. Sarasota Fruitville Drainage District, supra. AGO 087-188.

You have not brought to my attention nor has my research revealed any general law which purports to vest the Governor with the authority to waive the sovereign immunity of the state pursuant to an agreement entered into under the OCS Lands Act. In the absence of such legislation, I am compelled to conclude that the Governor does not have such authority.

The Florida Constitution requires specific,

clear and unambiguous language in a statute in order to waive the sovereign immunity of the state. See, Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978). Furthermore, the power of the state to contract is a legislative prerogative and any residual power or authority not expressly provided or limited by the State Constitution is vested in the legislative branch. See, 16 Am. Jur.2d Constitutional Law §§318 et seq. (1970); 10 Fla. Jur.2d Constitutional Law §§141 et seq. (1979); Ago's 071-28, 068-44. The Governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant, and therefore the Governor and other executive officers of the state have no general or inherent authority to contract in the state's behalf or to waive the sovereign

immunity of the state and they can bind the state by contract only within the power specifically conferred on them by law. See, C.J.S. States §§130, 156 (1977); Edgerton v. International Company, Inc., 89 So.2d 488 (Fla. 1956); Florida Industrial Commission ex rel. Special Disability Fund v. National Trucking Company, 107 So.2d 397 (1 D.C.A. Fla., 1959); AGO 071-28.

In conclusion, I am therefore of the opinion that the Governor is not authorized by the Constitution or by general law to waive the sovereign immunity of the state pursuant to a contractual agreement with the United States Department of Interior in order to obtain certain privileged and proprietary information concerning oil and gas reserves adjacent to the state's seaward boundary under the Outer Continental Shelf Lands Act, as amended, 43 U.S.C.

§1331, et seq. (1979).

Sincerely,

/s/ Jim Smith

JIM SMITH
Attorney General

Prepared By:

/s/ Craig B. Willis

CRAIG B. WILLIS
Assistant Attorney General

JS/CBS/is

NO. 80-532

SUPREME COURT, U.S.
FILED
JAN 2 1981
ALEXANDER L. STEVAS, CLERK

In The Supreme Court of the United States

OCTOBER TERM

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AND A. J. TAYLOR, SECRETARY OF THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

PETITIONERS

V

FLORIDA NURSING HOME ASSOCIATION, ET AL.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT NURSING HOMES

SHAW AND WARNER
Suites 607 & 611
New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
Telephone: (305) 374-2633

Counsel for Respondent
Nursing Homes

On the Brief:

ELLIOT S. SHAW
ERIC P. LITTMAN

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DISCUSSION

Since the filing of the Respondent nursing homes' Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, there has been filed a Supplemental and Reply Brief by the Petitioner State of Florida, three Amicus Curiae Briefs by twenty-five states in support of State of Florida's Petition for Certiorari, and a Brief for the Federal Respondent filed by the Solicitor General of the United States further supporting Florida's Petition for Certiorari. This intervening matter and argument was not available at the time of filing of the Respondent's Brief in Opposition. Therefore, this Supplemental Brief is filed pursuant to Rule 22.6 of the Rules of the United States Supreme Court (Eff. June 30, 1980)

At the time this Counsel filed the Complaint in Golden Isles Convalescent Center, Inc., v. Califano, 442 F. Supp. 201 (S.D. Fla. 1977) in October of 1976,[1] immediately after it was certain that the State of Florida had no intention of complying with Congress' statutory mandate to reimburse the Respondent nursing homes on a reasonable cost-related basis as of July 1, 1976, pursuant to 42 U.S.C. 1396 (a)(13)(E),[2] the Respondents determined that seeking

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1 For purposes of ruling on the retroactive reimbursement-Eleventh Amendment immunity issue, the Fifth Circuit consolidated the Golden Isles case name under the heading Florida Nursing Home case. See Florida Nursing Home Assoc. v. Page., 616 F.2d 1355, 1359 (5th Cir. 1980)

2 It was anticipated by Respondent nursing homes that shortly after the unexplained, delayed publication of HEW's final regulations for reasonable cost related-reimbursement on July 1, 1976, the State of Florida was one of the "good number of States [which] will be able to implement the greater part of these regulations fairly quickly...", (See Brief of Federal Respondent at 3 quoting 41 Fed.Reg. 27305 (1976) since the State of Florida had already been collecting cost-data from the Respondents since 1973 on State prepared forms. See also footnote 3 (b) infra.

extraordinary preliminary mandatory injunctive relief on the required basis of immediate and irreparable damage was not possible without extensive time consuming discovery which could not prove that the South Florida Nursing home industry doing business with Medicaid, would be immediately and irreparably destroyed.[3]

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[3] (a) Such a preliminary Motion for extraordinary relief would have engendered unnecessary fear and concern in the community and industry. In fact, to this date, despite consistent pressure from the industry, there has still been no trial on the facts of actual cost in the lower court proceedings of the Golden Isles and Florida Health Care Assoc. consolidated cases. These proceedings are currently pending District Court ordered submission of new findings by HHS of regulations for the proper determination of the costs of an efficient and economically operated nursing home. See Alabama Nursing Home Assoc. v. Harris, 617 F.2d 388 (5th Cir. 1980) and Golden Isles Convalescent Center, Inc. et. al. v. Califano, Order dated July 28, 1980, Judge W. H. Hoeveler, S.D. of Fla. Docket Case Nos. 76-1810, 77-559 Civ.

(b) Furthermore, just recently, in a status report filed December 16, 1980, from the Federal Respondent with the District Court, as to the new Florida Medicaid plan adopted pursuant to the District Court's Order of October 18, 1977, the Federal Respondent states: "...HHS has concluded that the Florida Title XIX Plan, in its present form does not meet Federal Statutory and regulatory requirements,..."

But it was precisely permanent mandatory injunctive relief that the Respondent's sought and obtained on October 18, 1977, after an entire year's delay due solely to the fact that the Federal Courts of the Southern District of Florida were faced with an incredible case over-load during 1976 and 1977 before the appointment of several new Federal District Judges. The South Florida industry acted as promptly and responsibly as legally possible in seeking protection of its rights utilizing all legal means possible.

In so doing, it became immediately apparent to the Respondents that the landmark case of Edelman v. Jordan 415 U.S. 651(1974) was dispositive of the Eleventh Amendment issues on both prospective and retroactive reasonable cost-related reimbursement. After careful reasoning, research and review, it became the sincere opinion of the Respondents that as to the issue of retroactive reimbursement-Eleventh Amendment immunity, experience had now shown the arguments of the four dissenters in the

Edelman v. Jordan decision, and then some, to be far more persuasive and coherent with reality than the majority's ruling.

Of course, only this United States Supreme Court could overrule its previous decision in the Edelman case and any request for an overruling of Edelman to the Federal District Court or the Fifth Circuit Court of Appeals would naturally and properly fall on deaf ears. Accordingly, this Counsel proffered the argument, among others, that the Edelman decision did not restrict retroactive reimbursement in this case because the State of Florida had expressly waived its Eleventh Amendment immunity for the reasons well briefed in the pending Briefs before the Court.

The Fifth Circuit Court's decision in Florida Nursing Home Assoc. v. Page, supra at 2, footnote 1, adopted this narrow argument of waiver and, in light of its inability to jurisdictionally overrule Edelman, even went so far as to state in its opinion that

> "a contrary holding in the circumstances of this case, where appellants Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1976, would achieve an inequitable result." Id at 1363.

Certainly, Judge Ainsworth and the Fifth Circuit Court were well familiar with Edelman and certainly had to know that because of the sensitivity and importance of its own ruling, it would be petitioned to this Supreme Court. The Respondents hereby submit that the Fifth Circuit was judiciously expressing its position that this Supreme Court strongly consider the overruling of Edelman v. Jordan supra and that is precisely why the Fifth Circuit included in its finding of waiver a reference to "inequitable result."

As victors in the Fifth Circuit, it would hardly be appropriate for the Respondents to support Certiorari review by this Court and accordingly, they objected to Florida's Petition for Certiorari on the issue of the soundness of the Fifth Circuit's valid finding of express waiver. It would be entirely illogical

and inconsistent for the Respondent nursing homes to ask this Court to overrule its decision in Edelman in a Brief objecting to this Court's basic exercise of Certiorari jurisdiction ab initio. Such argument and brief would only be appropriate if this Court were to accept Certiorari.

Despite this posture, what has now surfaced is an express request by the Federal Respondent that this Court accept Certiorari and then rule on the merits on a summary reversal basis pursuant to Rule 23.1 of the Rules of the United States Supreme Court since

> "The Respondent nursing homes and Nursing Home Association, in their briefs in opposition, have not offered any additional support for the Court of Appeals' ruling, and this Court's consideration of the disputed one-sentence contractual provision is not likely to be appreciably aided by further briefing and argument." Brief of Federal Respondents at 12.

This is not true.

The Respondent nursing homes have every intention of fully briefing and arguing the substantive merits of overruling Edelman v.

Jordan supra upon this Court's granting of Certiorari in addition to arguing the waiver ruling of the Fifth Circuit.

The simple possibility of summary reversal by this Court without the opportunity to fully brief and argue all the merits of the case themselves has an absolutely "chilling" effect on the Respondent nursing homes and seems to defy all basic standards of judicial review, due process and basic fair play.

In the American Bar Association Journal of recent November, 1980 date, in an article by Prof. Eugene Gressman entitled Supreme Court Practices: Circa 1980, it is noted that

> "This summary treatment of certiorari cases has been criticized frequently, particularly in light of the Court's admonition to keep all the preliminary certiorari papers as short as possible and to address only the 'cert-worthiness' of the case." Id at Volume 66, 1385,1389.

With great respect for this Court's time, the Respondent nursing homes have scrupulously complied with all of this Courts time, manner and color requirements under its new rules

and have taken all precautions to avoid long-winded dissertations of unnecessary scholarship in their jurisdictional objection briefs.[4] To punish them through Summary reversal would not only be a grave injustice to the Respondents, but the Court would rob itself of a most auspicious opportunity to more thoroughly examine its ill-conceived Edelman v. Jordan supra opinion and what that decision has wrought.

It has been well over six years since the Edelman decision was handed down by this Court, time for a decision's merit to be evaluated particularly in light of the ever-increasing speed and rapidity of modern American life. If this Court, after full briefing, challenge and argument, determines the majority decision to still be reasoned correctly, the Court and the country will have benefited from reassertion of the "impervious" logic of Edelman. If

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[4] In fact, in the related Florida Department of HRS et,al. v. Golden Isles Convalescent Center, Inc., et.al., petition for Certiorari, Case No. 80-85, cert denied October 6, 1980, the Respondent nursing homes filed only a waiver of objection letter.

however, the Court scrutinizes this important challenge and sees (i) that the Eleventh Amendment was never intended to supersede the Supremacy clause of the United States; (ii) that it is conflicting logic to jurisdictionally ignore the Eleventh Amendment for purposes of prospective Federal Court jurisdiction, but not for retroactive relief; (iii) that the negative ramifications of the Edelman decision is in conflict with the past history of relevant decisions by this Court, the Court and the country will have benefitted even more.

The importance of the Court's decision in this case must not be overlooked. We are fast coming upon "1984," and American government at all levels is growing bigger and bigger, faster and faster, and more incompetent and oppressive at every turn, while private enterprise, production and excellence are stymied in every corner and capital formation severely burdened.

The Eleventh Amendment as interpreted by this Court in Edelman v. Jordan supra, directly

and unintentionally promotes and protects incompetency in government and foisters intentional bureaucratic disregard of the rights of free enterprise. This fact costs the citizens of this great country billions of dollars in waste and inefficiency in State and Federal government while the taxable base of private industry is retarded. The potential risk from lawsuits based on statutorily created obligations are not only relatively di minimus, but are entirely predictable.[5] Without the Eleventh Amendment being interpreted by this Court as having given State government "carte blanche" freedom from responsibility from obvious violation of Federal laws, the Federal Congress and State legislatures would be forced to enact or participate in only those programs they

---

[5] As the Brief of the Federal Respondent at page 12 points out: "The time period concerned is only 15 months, and the amount of money at stake is only the difference between one Medicaid payment rate and another." Florida, in collecting costs data from 1973, could estimate very well what actual costs would be during 1976-77; ergo, so could the Federal Respondent.

could truly afford and will force far greater professionalism and business efficiency in bureaucratic administration of statutory obligations. The result could only protect the public purse, not dilute it, and perhaps produce far greater respect by government for the risks private enterprise is faced with daily, particularly problems with government. This Court must now deal with the rights of free enterprise under the Constitution in much the same way that it has so successfully coped with the rights of individuals in the past.

Mr. Justice Rehnquist, in writing the majority opinion in Edelman v. Jordan supra, wisely quoted Mr. Justice Brandeis:

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." Id at 671, footnote 14, citing Burnet v. Coronado

Oil and Gas Co., 285 U.S. 393, 406-408 (1932) (dissenting opinion).

The question now posed is whether Justice Rehnquist and this Court have risen to the magnitude of Mr. Justice Brandeis to at least hear and see and to test the resiliency of their logic.

CONCLUSION

Wherefore, should this Court grant the State of Florida's Petition for Writ of Certiorari, it must do so on a plenary review in the interests of all concerned.

Respectfully submitted,

SHAW & WARNER
Suites 607 & 611
New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone: (305) 374-2633

ELLIOT B. SHAW
Counsel for Respondents

CERTIFICATE OF SERVICE

I, Elliot S. Shaw, do hereby certify that I have this day mailed, first-class postage prepaid, a true and correct copy of this Supplemental Brief of the Respondent Nursing Homes to the following :

M. Stephen Turner
Culpepper, Beatty & Turner
Post Office Box 10261
600 Lewis State Bank Bldg.
Tallahassee, Florida 32302

A. Thomas Mihok, Esquire
5458 Woodcrest Drive North
Orlando, Florida 32807

The Solicitor General
Department of Justice
10th and Pennsylvania Ave. N.W.
Washington, D.C. 20530

Tyrone C. Fahner, Esquire
Attorney General of Illinois
160 North Lasalle Street
Suite 900
Chicago, Illinois 60601

Jim R. Bruce, Esquire
Special Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

Francis X.Bellotti
Attorney General Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Warren Spannaus
Attorney General Minnesota
515 Transportation Building
St. Paul, Minnesota 55155

This, the 31st day of December, 1980.

ELLIOT S. SHAW

Supreme Court, U. S.
FILED
NOV 3 1980

No. 80-532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF THE STATE OF ILLINOIS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TYRONE C. FAHNER,
Attorney General of Illinois
160 North LaSalle Street, Suite 900
Chicago, Illinois 60601 (793-3500)

Attorney for Amicus Curiae, State of Illinois

JAMES C. O'CONNELL
DAVID A. SCHLANGER
Special Assistant Attorneys General
130 North Franklin Street, Suite 300
Chicago, Illinois 60606
(312) 793-2380

Of Counsel

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Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF THE STATE OF ILLINOIS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Illinois as *amicus curiae* respectfully joins in the Petition of the Florida Department of Health and Rehabilitative Services and A. J. Taylor, its Secretary in requesting that a writ of certiorari issue to review the judgment entered May 6, 1980 of the United States Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Whether by agreeing to abide by federal laws and regulations applicable to the Medicaid program, Florida waived its Eleventh Amendment immunity from suit in federal court for retroactive damages sought by Medicaid providers because Florida complied with a federal regulation later declared in violation of a federal statute.

STATEMENT OF INTEREST

The State of Illinois has a direct financial and public policy interest in the outcome of this case. Through the Department of Public Aid, Illinois reimburses 800 skilled and intermediate care nursing facilities on a reasonable "cost-related" basis within the Congressional mandate of 42 U.S.C. § 1396a(a)(13)(E) of the Medicaid Act. Comprehensive state legislation has been enacted for the purpose of reimbursing such facilities. *See Ill. Rev. Stat.,* ch. 23, § 5-5.1 *et seq.* (1979). For fiscal year 1981 the Illinois General Assembly has appropriated in excess of $375,000,000 in order to make such payments.

Since its cost-related reimbursement plan has gone into effect, the State has been embroiled in almost continuous litigation concerning the validity of its reimbursement methodology. *See Unicare Health Care Facilities, Inc.* v. *Miller,* 481 F.Supp. 496 (N.D. Ill. 1979). Presently pending before the United States District Court for the Northern District of Illinois, Eastern Division are four cases challenging various aspects of the plan, some of which seek monetary relief dating back to July 1, 1976. It is clear that the State of Illinois has a vital interest in preserving its Eleventh Amendment sovereign immunity against federal suits for retroactive monetary awards as the state's liability could exceed over One Hundred Million Dollars in retroactive payments.

REASONS FOR GRANTING THE WRIT

A State does not waive its Eleventh Amendment sovereign immunity against actions for retroactive monetary relief by merely agreeing to abide by applicable regulations of the Medicaid program. The Fifth Circuit held that Florida, by contracting with nursing home operators to recognize and abide by all federal laws applicable to the Medicaid program, had "expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers [of nursing home services] alleging a breach of these laws." *Florida Nursing Home Ass'n* v. *Page,* 616 F.2d 1355, 1363 (5th Cir. 1980). The court reasoned that a contrary holding would produce an "inequitable result" because the nursing homes had provided services from July 1, 1976 for which they would not be fully compensated. *Id.* The State of Illinois contends that the court, by finding waiver of Florida's sovereign immunity, has *sua sponte* created a bluntly indiscriminate and destructive weapon which can be used to dismantle the Eleventh Amendment and which will effectively eviscerate this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

In *Edelman* v. *Jordan,* this Court held that a waiver of a state's Eleventh Amendment immunity would be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " 415 U.S., at 673, *quoting Murray* v. *Wilson Distilling Co.,* 213 U.S. 151, 171 (1909). The Fifth Circuit's holding clearly disregarded this Court's pronouncement that "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." 415 U.S., at 673. Nor does the

fact that Florida agreed to be bound by contract to federal requirements in its administration of the Medicaid Act lend any support to the Fifth Circuit's finding of a waiver. This Court's opinion in *Edelman* drew no distinction between the manner in which a state participates in a federally funded program. Indeed, its citation of *In re Ayers,* 123 U.S. 216 (1887) and *Hagood* v. *Southern,* 117 U.S. 52 (1886), which were both actions against state officers for specific performance of a contract to which the State was a party, demonstrates that actions sounding in contract may be barred by the Eleventh Amendment. Rather, the only distinction found permissable for Eleventh Amendment purposes "was the difference between prospective relief on one hand and retrospective relief on the other." *Quern* v. *Jordan,* 440 U.S. 332, 337 (1979). As the relief sought in the instant case is "retroactive in nature", 616 F.2d at 1362, it is clearly barred by the Eleventh Amendment.

The more disturbing aspect of the Fifth Circuit's opinion is its consideration of whether a waiver of the state's sovereign immunity should be found in order to prevent reaching an "inequitable result." Specifically, the court felt that the nursing homes should be *fully* compensated for the services they had provided since July 1, 1976 on a cost-related basis. Yet, this line of reasoning that nursing home operators are entitled to state funds as a "form of compensation" is inconsistent with decisions of both this Court, *see Edelman* v. *Jordan, supra,* 415 U.S., at 668, and the United States Court of Appeals for the Seventh Circuit. In *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459 (1945), a taxpayer, who had paid taxes to the State of Indiana under protest, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. It was perhaps "inequitable" to deny the relief sought in that case, since the taxpayer had at one time possessed the money, and paid it over to the State pursuant to an allegedly uncon-

stitutional tax. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State and barred by the Eleventh Amendment. In *Shashoua* v. *Quern,* 612 F.2d 282 (7th Cir. 1980), a physician brought an action against the Illinois Department of Public Aid claiming, *inter alia,* that the Department's level of reimbursement for services rendered to Medicaid patients was inadequate and eventually forced him to end his practice. *Id.* at 283. Presumably, under the Fifth Circuit's line of reasoning, the Seventh Circuit should have deemed the Department's conduct "inequitable" and found a waiver of the State's sovereign immunity. Yet the court held that "[t]o the extent that the plaintiff seeks damages or any other retroactive relief against Illinois, the action is, . . ., outside the jurisdiction of the federal courts." *Id.* at 284. The real "inequity" of the Fifth Circuit's decision is that it allows Medicaid providers access to federal courts to seek retroactive monetary relief from the State, whereas Medicaid recipients are precluded from similar relief. *See Carey* v. *Quern,* 588 F.2d 230, 233 (7th Cir. 1978); *Townsend* v. *Edelman,* 518 F.2d 116, 121-22 (7th Cir. 1975); *Wilson* v. *Weaver,* 499 F.2d 155, 158 (7th Cir. 1974). The State of Illinois contends that such an anomalous distinction cannot be permitted to stand.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General of Illinois
160 North LaSalle Street, Suite 900
Chicago, Illinois 60601 (793-3500)

Attorney for Amicus Curiae,
State of Illinois

JAMES C. O'CONNELL
DAVID A. SCHLANGER
Special Assistant Attorneys General
130 North Franklin Street, Suite 300
Chicago, Illinois 60606
(312) 793-2380

Of Counsel

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FRANCIS X. BELLOTTI, Attorney General
COMMONWEALTH OF MASSACHUSETTS

Mitchell J. Sikora, Jr.
Scott A. Smith
Assistant Attorneys General

WARREN SPANNAUS, Attorney General
STATE OF MINNESOTA

William P. Marshall
Assistant Attorney General

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FRANCIS X. BELLOTTI, Attorney General
COMMONWEALTH OF MASSACHUSETTS

Mitchell J. Sikora, Jr.
Scott A. Smith
Assistant Attorneys General

WARREN SPANNAUS, Attorney General
STATE OF MINNESOTA

William P. Marshall
Assistant Attorney General

Richard S. Gebelein, Attorney General, STATE OF DELAWARE

Arthur K. Bolton, Attorney General, STATE OF GEORGIA

Theodore L. Sendak, Attorney General, STATE OF INDIANA

Robert T. Stephan, Attorney General, STATE OF KANSAS

Steven L. Beshear, Attorney General, COMMONWEALTH OF KENTUCKY

Richard S. Cohen, Attorney General, STATE OF MAINE

Stephen H. Sachs, Attorney General, STATE OF MARYLAND

Gregory H. Smith, Acting Attorney General, STATE OF NEW HAMPSHIRE

Robert Abrams, Attorney General, STATE OF NEW YORK

Allen I. Olson, Attorney General, STATE OF NORTH DAKOTA

William J. Brown, Attorney General, STATE OF OHIO

James A. Redden, Attorney General, STATE OF OREGON

Harvey Bartle III, Attorney General, COMMONWEALTH OF PENNSYLVANIA

Dennis J. Roberts II, Attorney General, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Mark V. Meierhenry, Attorney General, STATE OF SOUTH DAKOTA

Robert B. Hansen, Attorney General, STATE OF UTAH

Bronson C. LaFollette, Attorney General, STATE OF WISCONSIN

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INTEREST OF THE AMICI

The Commonwealth of Massachusetts, the State of Minnesota and the other amici states submit this amicus brief in support of the State of Florida, Department of Health and Rehabilitative Services' (Florida DHRS) petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the case of Florida Nursing Home Ass'n. v. Page, 616 F.2d 1355 (5th Cir. 1980). The amici states wish to express to the Court their belief that the Fifth Circuit decision that Florida

waived its Eleventh Amendment immunity to suit in federal court constitutes a grave departure from the principles of sovereign immunity recognized by this Court.

The imposition of retroactive monetary relief against the state authorized by the Fifth Circuit represents an unprecedented diminution of the constitutional immunity afforded the states by the Eleventh Amendment. Moreover, the amici states intend to contrast the Fifth Circuit's opinion in this case with the decisions of this Court which give precise guidance to federal courts faced with claims by private parties for retrospective monetary relief against the states. In so doing, the amici states seek to expose the erroneous reasoning which has led the Fifth Circuit to impose on Florida the unjustified burden of amenability to an award of retrospective monetary relief in federal court. Should other federal district courts adopt this faulty rationale, the amici states could also be held responsible for payment of retrospective monetary damages in cases where health care providers successfully challenge a state's Medicaid reimbursement plan. Furthermore, the rationale adopted by the Fifth Circuit in this case could be applied to a large number of other cooperative federal-state programs of shared financial responsibility. As those who would bear the tremendous fiscal hardship which would be generated by

judicial imposition of retrospective monetary relief, the amici states are uniquely qualified to convey these concerns to the Court.

SUMMARY OF THE ARGUMENT

In the initial section of their argument, the amici states argue that Congress has expressed its intention not to require states that participate in the Medicaid program to abrogate their Eleventh Amendment immunity. Although Congress did enact a provision requiring states participating in the inpatient hospital care segment of the Medicaid program to consent to suit by providers of such services, it later rescinded the requirement retroactively. Because Congress never required states to consent-to-suit by providers of long-term nursing care services under the Medicaid program, and because it repudiated a waiver provision briefly addressed to suits by providers of inpatient hospital services, the intention of Congress not to abrogate the Eleventh Amendment immunity of states participating in the Medicaid program is firmly established. Moreover, the amici states contend that the Florida DHRS, through its contract with providers of long-term nursing care services, did not waive Florida's Eleventh Amendment immunity by agreeing to comply with federal law. The agreement to comply with federal law does not constitute an

unequivocal statement or an overwhelming implication of a definitive intention to waive Florida's Eleventh Amendment immunity. Even if it does, the Florida DHRS lacks authority to waive Florida's Eleventh Amendment immunity because the Florida Constitution directs that only the Legislature may take such action.

The amici states, in the second section of their brief, direct the Court's attention to the effect of the Court's decision in Harris v. McRae, __ U.S. __ (1980), 100 S.Ct. 2671 (1980), on the Fifth Circuit's decision in this case. In McRae, the Court held that because Title XIX creates a cooperative program of federal-state financial responsibility for the cost of providing medical services to Medicaid patients, participating states cannot be required to reimburse health care providers for services for which federal contributions are unavailable. Federal reimbursement to assist Florida in making payments for the retroactive monetary relief approved by the Fifth Circuit is not available. Therefore, in accordance with the rule announced in McRae, Florida has no substantive liability under Title XIX for payment of retrospective monetary relief to health care providers.

ARGUMENT

I. The Eleventh Amendment: Abrogation By Congress And Waiver By The States.

This Court has indicated that before a judicial determination can be made that a state is amenable to suit in federal court by private parties seeking retrospective monetary relief, two questions must be addressed. First, whether Congress, by statute, has expressed its intention to abrogate the Eleventh Amendment immunity of states that participate in a federal program, and second, whether a state by participating in a program established by Congress or by other deliberate action has consented to abrogation of Eleventh Amendment protection. Edelman v. Jordan, 415 U.S. 651, 672 (1974). See also Employees v. Department of Public Health and Welfare, 411 U.S. 279, 285 (1973); Parden v. Terminal Railway Company, 377 U.S. 184, 191-93 (1964).

Congress not only has power under Article I of the Constitution to regulate selected state activities, it may also subject states to suit by private litigants in federal

court for non-compliance with statutory requirements.[1/] Parden, 377 U.S. at 195. But, if it intends to annul the Eleventh Amendment immunity of the states, Congress must express its determination in "clear language that the constitutional immunity [has been] swept away." Employees, 411 U.S. at 285. In the absence of an explicit provision subjecting states to suit by private parties in federal court for violation of federal regulations, the Court has refused to sanction the award by federal courts of retrospective monetary relief against the states. Edelman, 415 U.S. at 652; Employees, 411 U.S. at 285.

1/ This congressional power, however, is not unconditional. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court concluded that the Commerce Clause did not empower Congress to regulate the wages and hours of state employees through the Fair Labor Standards Act. The 1974 amendments to FLSA contained a congressional directive rendering state employers subject to private enforcement actions. The Court held that establishment of wages and hours for state employees was so central to the operation of state government that Congress' attempt to regulate such matters through the Commerce Clause was invalid.

Just as there must be a manifest congressional intention to abrogate Eleventh Amendment immunity before the protection may be eliminated, a state that decides to waive its Eleventh Amendment immunity must do so in a clear and unmistakable manner. Edelman, 415 U.S. at 673. Once Congress has expressed its intention to annul Eleventh Amendment immunity in the context of a program which regulates state activities in a selected area, the participation of states in the regulated activities indicates their consent to abrogation of Eleventh Amendment protection. Id. at 672; Parden, 377 U.S. at 196. But, when Congress has not authorized enforcement actions against the state by private parties in federal court, state participation in a federal program does not constitute waiver by the state of its Eleventh Amendment immunity. Edelman, 415 U.S. at 672. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, [this Court] will find waiver only where stated 'by the most express language or by such overwhelming implications in the text as [will] leave no room for any other reasonable construction.'" Id. at 673, quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

A. Congress Has Expressed Its Intention Not To Subject Participating States To Suit In Federal Court.

Congress enacted Title XIX of the Social Security Act, 42 U.S.C. §§1396a-k (1976), for the purpose of providing cost-effective health care services to indigent persons in need of medical care. The Medicaid program, as Title XIX is commonly known, is a cooperative state-federal system of financial participation in state expenditures for health care services which seeks to encourage the improvement of state welfare programs by making federal financial participation available to the states. See Harris v. McRae, __ U.S. __, __ (1980), 100 S.Ct. 2671, 2684 (1980). The program is administered by the states in accordance with federal law and regulations promulgated by the Department of Health and Human Services.

States are required by 42 U.S.C. §1396a(a)(13)(E) to reimburse providers of skilled nursing care "on a reasonable cost related basis" under a plan which, after being developed by the states, must be "approved and verified by the Secretary" of Health and Human Services (Secretary). Somewhat different standards must be met by the states for reimbursing other health care providers such as hospitals and rural health clinics, and these

methodologies must also be approved by the Secretary. 42 U.S.C. §§ 1396a(a)(13)(D) (State plans must provide reimbursement for "the reasonable cost of inpatient hospital services" and must be "reviewed and approved by the Secretary.") and (F) (State plans must provide reimbursement for services dispensed by rural health clinics to Medicaid recipients by paying "100 percent of costs which are reasonable and related to the cost of furnishing such services or based on such other tests of reasonableness, as the Secretary may prescribe.").

As originally enacted, Title XIX did not include any provision which could be construed as a requirement that states must waive their Eleventh Amendment immunity as a condition of participation. However, in 1975, Congress was confronted with myriad complaints from health care service providers that some states were implementing inadequate Medicaid reimbursement programs which had not been approved by the Secretary. The providers objected that because the Eleventh Amendment precluded suits in federal court to recover monetary relief from non-complying states, providers had no recourse for recovering the reasonable costs of providing health care services to Medicaid patients.

Late in 1975, Congress acceded to the vigorous pleas of the providers and added 42 U.S.C. §1396a(g) to Title XIX which required the states to amend their Medicaid

plans to include consent to suit in the federal courts by hospitals[2/] over disputes relating to the payment of reasonable costs for health care services provided to Medicaid patients.[3/]

This statutory requirement was in force for only a few months, however, when the Congress realized it had been mistaken in its attempt to coerce states to waive their sovereign immunity. The House passed repealing legislation in May, 1976, and the Senate soon followed suit. Then, on October 18, 1976, the President signed Pub. L. No. 94-552 which repealed the mandatory waiver of immunity provision as of January 1, 1976, the date on which it originally took effect. Both the Senate

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2/ Section 1396a(g) did not require that states consent to suits by nursing homes or other health care providers.

3/ Section 111 of Pub. L. No. 94-182, which contains the mandatory waiver provision, also provided that, if a state failed to amend its Medicaid plan to include a consent-to-suit stipulation, the amount of federal funds payable to the non-complying state would be reduced by ten percent.

and the House reports[4/] which accompanied the repealing legislation voiced concern about the urgent nature of the problems generated by the mandatory waiver of Eleventh Amendment immunity. In addition to discussing the serious questions concerning the constitutionality of the provision, the House Report in particular observed that the waiver would produce extremely burdensome lawsuits which would "make efficient program administration virtually impossible." H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. (1976) at 4.

Congress' brief experiment with peremptory waiver of the states' Eleventh Amendment immunity in cases brought by hospitals to challenge Medicaid reimbursement plans was quickly abandoned in light of the highly disruptive effect such a requirement would have had on the expeditious development and implementation of effective state Medicaid programs. Upon reviewing the rationale advanced in support of the mandatory Eleventh Amendment immunity waiver provision, Congress rejected it and specifically adopted a policy reaffirming the

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4/ H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. (1976); Sen. Rep. No. 94-1240, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 5648.

application of Eleventh Amendment protections for states which participate in the Medicaid program.

The intent of Congress is evident. When it enacted the provision waiving the Eleventh Amendment immunity of states participating in the Medicaid inpatient hospital care program, Congress declined to impose a similar requirement on states involved in the long-term nursing care segment of the Medicaid program. Then, by retroactively repudiating the waiver provision, Congress evinced its intention not to remove the Eleventh Amendment immunity of states that participate in any phase of the Medicaid program. See Hospital Association of New York State v. Toia, 577 F.2d 790 (2d Cir. 1978).[5/] Thus, "in this case the threshold fact of

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5/ In Toia, the Second Circuit was confronted with a claim made by a hospital association that its members should be permitted to recover retroactive monetary relief from New York even though Congress had repealed the compulsory Eleventh Amendment waiver provision and New York had withdrawn its earlier consent-to-suit in federal court. The court held that without the consent-to-suit provision and New York's compliance with (footnote continued)

congressional authorization to sue a class of defendants which literally includes the States is wholly absent."[6/] Edelman, 415 U.S. at 672.

5/ continued
it, the federal district court could not have entertained the action. 577 F.2d at 795-96. While Toia does not represent a direct conflict with the Fifth Circuit's decision in this case, it is a strong indication that the Second Circuit would have concluded that, in the absence of congressional abrogation of Eleventh Amendment immunity, Florida is not amenable to suit in federal court for retrospective monetary relief.

6/ It is instructive to contrast the position taken by Congress regarding the relationship of the Eleventh Amendment and Title XIX with Congress' decision to abrogate Eleventh Amendment immunities in actions under Title VII of the 1964 Civil Rights Act by authorizing federal courts to make back pay awards to employees of state government units that have violated Title VII. In Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976), the Court held that Eleventh Amendment immunity is limited by the enforcement provisions of Section 5 of the Fourteenth (footnote continued)

B. The Contract Executed By The Florida DHRS With Skilled Nursing Care Providers Does Not Constitute A Waiver Of Florida's Eleventh Amendment Immunity.

The Florida DHRS drafted and executed a contract with providers of skilled nursing care which defines the responsibilities of the Florida DHRS and the providers in the administration of the Florida skilled nursing care Medicaid program. The sixth paragraph of the contract provides:

6/ continued

Amendment upon which Congress relied when it extended coverage of Title VII to state employers. The Court observed that when it acts pursuant to Section 5, Congress has plenary legislative authority to enforce the substantive provisions of the Fourteenth Amendment and it may employ that power to abrogate the states' Eleventh Amendment immunity. The scope of the congressional prerogative under Section 5 to regulate state activities and to annul Eleventh Amendment immunity is significantly greater than that provided under Article I. 427 U.S. at 456. See also Hutto v. Finney, 437 U.S. 678 (1978).

> Both the provider and the Single State Agency hereby agree to recognize and abide by all state and federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

The Fifth Circuit grasped this language to support its conclusion that, by entering into the provider contracts, the Florida DHRS expressly waived Florida's Eleventh Amendment immunity and "consented to suit in federal court regarding any action by providers alleging a breach of these laws." Florida Nursing Home Ass'n., 616 F.2d at 1363. Through its analysis of the legal effect of the contract provision, the Fifth Circuit attempted to resolve the question of what kind of state action can be viewed as a waiver of Eleventh Amendment immunity.[7/]

[7/] As the Fifth Circuit notes, by giving the Florida DHRS the right to sue and be sued, Florida has consented to actions brought by health care service providers in its own courts. Such a policy, however, has no impact on the preservation of the state's Eleventh Amendment immunity. Trotman v. Palisades Interstate Park Commission, 557 F.2d 35, 40 (2d Cir. 1977); Martin v. University of Louisville, 541 F.2d 1171, 1174-76 (6th Cir. 1976).

As the amici have previously noted, this Court has established very clear guidelines for determining whether a state has acted to waive its Eleventh Amendment immunity. It has rejected any form of constructive consent as a ground for finding that a state has waived the constitutional protection afforded by the Eleventh Amendment. Edelman, 415 U.S. at 673. Cf. United States v. King, 395 U.S. 1, 4 (1969); Soriano v. United States, 352 U.S. 270, 276 (1957). Moreover, the Court has created an imperative standard which requires that, before a federal court may determine that a state has waived its Eleventh Amendment immunity, the court must find unequivocal language or "overwhelming implications" in the text of an act of the state legislature which manifests a definitive intention to abrogate Eleventh Amendment immunity. Edelman, 415 U.S. at 673; Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 458, 466-69 (1945); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 51-52 (1944); Murray, 213 U.S. at 171-72; Smith v. Reeves, 178 U.S. 436, 445-46 (1900).

The Fifth Circuit's decision in this case failed to apply correctly these principles and its analysis of the contract provision in question suffers from the same defective reasoning that led the Court of Appeals in Edelman to its erroneous conclusion. The Seventh Circuit's decision in Edelman (Jordan v. Weaver, 472 F.2d 985 [7th Cir. 1973]), rested in large measure upon its

conclusion that Illinois, through its participation in the Aid to the Aged, Blind and Disabled program (also a federal-state cost sharing welfare plan) agreed to comply with federal statutes and regulations and thereby consented to suit by private parties seeking retrospective enforcement of federal regulatory requirements. The Fifth Circuit reaches a similar conclusion through its interpretation of the contract provision requiring the Florida DHRS to comply with federal law relating to the administration of the Florida Medicaid program. Like the Seventh Circuit, the Fifth Circuit mistakenly concluded that the acknowledged intention of a state or its social service agency to act in accordance with federal law constitutes waiver of Eleventh Amendment immunity. As this Court observed in Edelman, a state's intention to conform with federal law is at best constructive consent by the state to the abandonment of its Eleventh Amendment immunity. 415 U.S. at 673. Constructive consent, however, is insufficient to effect a surrender of constitutional rights including the protection afforded the states by the Eleventh Amendment.

The Fifth Circuit is wrong. The contract provision does not constitute "a clear declaration of the state's intention to submit its fiscal problems to other courts

than those of its own creation."[8/] Great Northern Life Ins. Co., 322 U.S. at 54, quoted with approval in Edelman, 415 U.S. at 673.

8/ In a case recently decided by the Chief Judge of the United States District Court of Minnesota, the plaintiff health care providers argued that they were entitled to recover retrospective monetary damages from Minnesota because the Minnesota Department of Public Welfare through its regulations and its contract with the providers agreed to comply with federal law in administering the Minnesota Medicaid program. In its opinion, the court reviewed the Fifth Circuit's decision in this case, but declined to follow it even though the two cases bear a close factual resemblance. In contrast to the Fifth Circuit, the District Court held that the state's agreement to comply with federal law did not constitute an express declaration of intent to waive Eleventh Amendment immunity. Minnesota Association of Health Care Facilities v. Minnesota Department of Public Welfare, No. 3-77-467, Slip. Op. at 5-6 (D.Minn. Oct. 15, 1980).

C. The Florida DHRS Lacks Authority To Waive Florida's Eleventh Amendment Immunity.

In its decision that the Florida DHRS, by drafting and executing the contract with providers of skilled nursing care, waived Florida's Eleventh Amendment immunity, the Fifth Circuit neglected to consider the authority of the Florida DHRS to waive the constitutional protection afforded by the Eleventh Amendment. The authority of an administrative or executive department to waive sovereign immunity on behalf of a state has long been recognized as a question of state law. Ford Motor Co., 323 U.S. at 467. The issue, therefore, is most appropriate for resolution in the first instance by the state courts. Id. See also Scott v. Board of Supervisors, 336 F.2d 557, 558-60 (5th Cir. 1964).

Waiver of Florida's sovereign immunity is governed by Article X, Section 13 of the Florida Constitution which provides:

> Suits against the State.-
> Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

The Supreme Court of Florida has interpreted this constitutional provision to require "specific, clear, and

unambiguous language in a statute to constitute a waiver of sovereign immunity." Manatee County v. Town of Longboat Key, 365 So.2d 143, 147 (Fla. 1978). The Florida Legislature has not abrogated Florida's Eleventh Amendment immunity, nor has it specifically delegated to the Florida DHRS the power to do so. Only one conclusion can be drawn from the Florida Constitution and its interpretation by the Florida Supreme Court: the Florida DHRS lacks authority under Florida law to waive the state's Eleventh Amendment immunity. Therefore, even if the Florida DHRS contract with skilled nursing care providers could be construed to include a waiver of immunity provision, which the amici contend that it cannot, the Fifth Circuit should have held this provision void as a matter of state law.

II. Florida May Not Be Required To Pay Retrospective Monetary Relief Under The Medicaid Act Since Federal Reimbursement For Such An Expense Is Unavailable.

Title XIX creates a cooperative program of shared financial responsibility in which contributions are made by both the federal government and participating states. Harris v. McRae, __ U.S. at __, 100 S.Ct. at 2684. After reviewing the basic cost-sharing format of Title XIX, this

Court, in Harris v. McRae, held that "Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable." __ U.S. at __, 100 S.Ct. at 2684.

The rule announced by the Court in McRae is critical to determining whether Florida can be required to pay retrospective monetary damages to providers of skilled nursing care. The circumstances of this case bear a close resemblance to those obtaining in McRae where federal funding to assist states in making reimbursement for Medicaid abortion services had been prohibited by Congress. Here, federal contributions to assist Florida in making payments for the retrospective damages approved by the Fifth Circuit are not available because there is no federal appropriation from which such funds can be taken. The Departments of Labor and Health, Education and Welfare Appropriations Act, 1977 Pub.L. No. 94-439, 90 Stat. 1429 (1977),[9/] authorized federal financial

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9/ The 1977 Appropriations Act provided in pertinent part:

> In the administration of titles I, IV (other than part C thereof), X, XIV, XVI, XIX and XX,

(footnote continued)

contributions only if a satisfactory state plan had been submitted within the applicable time period, a precondition not met by Florida because its conforming state plan was not submitted until December, 1977. As with its failure to provide federal financial contributions for Medicaid abortions (a controlling factor in McRae), Congress has declined to appropriate a federal contribution for Medicaid services rendered prior to the submission of a satisfactory state Medicaid plan. Therefore, in accordance with the McRae decision, Florida has no substantive liability under Title XIX for payment of retrospective relief to health care providers.

9/ continued

respectively, of the Social Security Act, payments to a State under such titles for any quarter in the period beginning July 1, 1976 and ending September 30, 1977 may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

Furthermore, the unavailability of federal funds to help defray the cost of increased reimbursement for health care services rendered prior to the District Court's decision in this case has an important impact on the Fifth Circuit's conclusion that Florida waived its Eleventh Amendment immunity. Under no other circumstances would the state be required to pay the entire cost of reimbursement for Medicaid services. Mindful of this onerous burden, the Florida DHRS by merely agreeing to comply with federal law certainly did not intend to abandon Florida's Eleventh Amendment immunity when to do so would subject the state to an enormously disproportionate financial obligation. Therefore, as this Court's decision in McRae plainly indicates, the Fifth Circuit erred when it failed to consider the effect of the cooperative federal-state cost-sharing system established by Title XIX when it concluded that Florida waived its Eleventh Amendment immunity in this case.

CONCLUSION

The Court should grant the Florida DHRS petition for certiorari in this case. The Court would then have an opportunity to analyze the substantive issue of Eleventh Amendment immunity in the Title XIX setting and to determine what specific action must be taken by a state to waive this important constitutional protection.

Moreover, this case offers the Court an opportunity to avert the exceedingly adverse impact of the Fifth Circuit's decision on the administration of the Florida Medicaid program and the programs of many other states.

For all these reasons, then, the amici states urge the Court to accept this case for plenary consideration and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment in the case of Florida Nursing Home Ass'n v. Page.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Mitchell J. Sikora, Jr.

Scott A. Smith

Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1011

WARREN SPANNAUS
ATTORNEY GENERAL

William P. Marshall
Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
(612) 296-3206

Richard S. Gebelein, Attorney General, STATE OF DELAWARE

Arthur K. Bolton, Attorney General, STATE OF GEORGIA

Theodore L. Sendak, Attorney General, STATE OF INDIANA

Robert T. Stephan, Attorney General, STATE OF KANSAS

Steven L. Beshear, Attorney General, COMMONWEALTH OF KENTUCKY

Richard S. Cohen, Attorney General, STATE OF MAINE

Stephen H. Sachs, Attorney General, STATE OF MARYLAND

Gregory H. Smith, Acting Attorney General, STATE OF NEW HAMPSHIRE

Robert Abrams, Attorney General, STATE OF NEW YORK

Allen I. Olson, Attorney General, STATE OF NORTH DAKOTA

William J. Brown, Attorney General, STATE OF OHIO

James A. Redden, Attorney General, STATE OF OREGON

Harvey Bartle III, Attorney General, COMMONWEALTH OF PENNSYLVANIA

Dennis J. Roberts II, Attorney General, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Mark V. Meierhenry, Attorney General, STATE OF SOUTH DAKOTA

Robert B. Hansen, Attorney General, STATE OF UTAH

Bronson C. LaFollette, Attorney General, STATE OF WISCONSIN

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No. 80-532

In the Supreme Court of the United States

October Term, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AND A. J. TAYLOR, Its Secretary,
Petitioners,

vs.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF MISSISSIPPI, ALABAMA, LOUISIANA, GEORGIA, MISSOURI, NORTH DAKOTA, KANSAS, KENTUCKY, AND WEST VIRGINIA, AMICI CURIAE IN SUPPORT OF PETITIONER

BILL ALLAIN
Attorney General
State of Mississippi
JIM R. BRUCE, II
(Counsel of Record)
Special Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205
(601) 354-7130
Attorneys for Amici Curiae in Support of Petitioner

(Other Counsel Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
7th Floor
2-3-4 Loyola Building
New Orleans, Louisiana 70112

RICK D. JOHNSON
Solicitor General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505

ROBERT T. STEPHAN
Attorney General
State of Kansas
2nd Floor, Kansas Judicial Center
Topeka, Kansas 66612

CHARLES A. GRADDICK
Attorney General
State of Alabama
Administrative Building
64 North Union Street
Montgomery, Alabama 36130

JOHN ASHCROFT
Attorney General
State of Missouri
Supreme Court Building
Post Office Box 899
Jefferson City, Missouri 65102

ARTHUR K. BOLTON
Attorney General
State of Georgia
132 Judicial Building
Atlanta, Georgia 30334

CHAUNCEY H. BROWNING
Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305

STEVEN L. BESHEAR
Attorney General
State of Kentucky
State Capitol
Frankfort, Kentucky 40601

Other Counsel for Amici Curiae in Support of Petitioner

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The states which have joined in this brief all participate in the joint State-Federal medical assistance programs established and administered by the States and funded by state appropriations and federal grants.[1] As recipients of federal grants for Medicaid, states are required to submit state plans for medical assistance to the Department of Health and Human Services. States, once they have elected to participate in the Medicaid Program,

1. Arizona is the only state which does not participate in the Medicaid Program.

must comply with the federal laws applicable to the program. *King v. Smith,* 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968).

The Federal Medicaid Statute 42 U.S.C. §1396a(a)(13)(E) requires that states reimburse providers of long-term care services on a "reasonable Cost-related" basis. States are further prohibited from restricting or limiting reimbursement for mandatory services where such costs are both reasonable and cost-related. As a result states have little means for controlling escalating costs and utilization of mandatory service such as skilled nursing care. Consequently, each year state Medicaid agencies find it more and more difficult to secure the necessary state appropriations to fund their medical assistance programs. State agencies frequently find it necessary to seek supplemental appropriations from their legislatures to continue the Medicaid Programs to the end of their fiscal years. Unfortunately, all too often, states must make cuts in their Medicaid budgets by reducing or terminating services. Although states may not terminate or limit mandatory services, they can and frequently do make cuts in optional services such as the drug programs, intermediate care facilities, hospital days, and physicians' visits. These reductions have a serious impact on the needy citizens of such states. Many states have already made all the reductions and limitations that can reasonably be made without further jeopardizing the health of the aged, blind, disabled and dependent children within the states.

Unanticipated expenses have a particularly drastic impact on the continuation and availability of services in the state Medicaid Programs. This is especially true where the expenses are significant in amount. Long-term nursing care in most state programs is the single most expensive service and even a slight percentage increase in cost from

that program may significantly affect the very existence of other health services.[2]

The Fifth Circuit Court of Appeals' decision in *Florida Nursing Home Association v. Page*, 616 F.2d 1355 (5th Cir. 1980) offers an example of an unanticipated cost to state Medicaid Programs. The Court's decision would require the state agency to provide retroactive reimbursement based on subsequent developments in the law.[3]

Increases in program costs as a result of higher than average inflation, increased eligibility and benefits cost, a growing reluctance on the part of the public and legislatures to fund open-ended health care programs for the needy, not to mention potential liability for retroactive reimbursement of expenses, are certain to result in further reductions in the medical assistance programs.

In order to maintain an effective Medicaid Program without the threat of major disruptions in the services provided, Amici Curiae join this case in support of the position taken by the State of Florida.

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2. Mississippi's total budget for Medicaid services for the 1980 fiscal year is $234,337,617. Of this amount $97,913,398 is budgeted for nursing home care. During 1979 36.9% of Mississippi's medicaid budget was expended for nursing home care.

Alabama's total Medicaid budget for fiscal year 1979 was $275,017,155 of which $104,995,732 was expended for nursing home care.

Kentucky's total budget for Medicaid services for the 1979 fiscal year was $248,190,828 with $103,335,720 being expended for nursing home care.

Georgia's budget for Medicaid services for 1979 was $618,-429,407; Georgia however is on an accrual accounting budget system and $116,157,460 was held in reserve to pay for claims from the prior year. Long-term care facilities in Georgia include Skilled Nursing Facilities, Intermediate Care Facilities, and Intermediate Care Facilities for the Mentally Retarded. Long-Term nursing care expenditures totaled $195,062,941 for 1979.

3. Counsel for Petitioner has advised that respondents seek between $3,000,000 and $30,000,000 in retroactive reimbursement, the amount being dependent on method of reimbursement.

ARGUMENT

A State Medicaid Agency Does Not Waive the State's Eleventh Amendment Immunity by an Agreement to Abide by Federal Laws Applicable to the Medicaid Program

State plans for medical assistance under 42 U.S.C. §1396a *et seq.* must provide

> . . . for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost finding methods approved and verified by the Secretary; * * *. (§1396a(a)(13)(E)).

Pursuant to 42 C.F.R. §447.301 *et seq.* rates for providers nursing home care are set based on a reasonable cost-related basis. In determining what constitutes reasonable cost-related reimbursement, the state first promulgates rules or guidelines defining those allowable items of cost reasonably related to providing nursing home care. In addition, the state also secures cost reports or data from the providers showing their actual costs. These actual costs are reviewed to determine the items of allowable cost. The resulting actual allowable costs are checked to determine whether they are consistent with "a facility that is economically and efficiently operated." The resulting cost is based upon reasonable allowable costs of an economical and efficiently operated nursing home. This figure is adjusted to reflect economic conditions and trends for the period for which the rates are set.[4] Thus, a pro-

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4. Counsel for Petitioners has advised that this is the same basic procedure followed by Florida DHRS.

vider knows what rate he will receive for the coming year before he provides any services. Should he disagree with the methodology adopted by the agency to set rates, his remedy is an action to enjoin the officials to comply with the federal law rather than a suit for damages or retroactive reimbursement over a period of years.

This Court in its decision in *Alabama v. Pugh,* 328 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) held that a state or state agency is absolutely immune to suit in federal court absent its consent. The Court there stated:

> There can be no doubt, however, that suit against the state and its board of corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of a suit. [Citations omitted]. Pp. 781-782).

The Fifth Circuit Court of Appeals in its decision while observing that the Florida legislature by statute authorized Florida Department of Health and Rehabilitative Services (DHRS) to "contract and be contracted with, sue and be sued" in actions *ex contractu,* stated:

> This language, standing alone, however, does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. [Citations omitted].

The Court however, concluded that Florida had done more than merely waive its sovereign immunity in state court for actions arising out of contract. It found that Florida DHRS had executed a contract with the respondent nursing homes wherein it was agreed that DHRS would abide by federal laws, regulations, and guidelines applicable to the Medicaid Program, and in doing so had waived the State of Florida's Eleventh Amendment Immunity. In essence the Court found that *Fla. Stat. Ann.* §402.34 (West

Supp. 1970) gave Florida DHRS authority to bind the state by contract "for all purposes necessary to administer" its programs and that such contractual capacity conferred upon the agency by the Florida legislature also conferred upon the agency the authority to waive the State's Eleventh Amendment Immunity. The statute makes clear beyond question that the agency could contract only to the extent necessary to implement its programs. Waiver of the State's Eleventh Amendment Immunity is not required for the agency to administer any of its programs. The Fifth Circuit subsequently found that DHRS's agreement that it would be bound by federal law and regulations amounted to consent by the state to suit in federal court. Apparently, the Court considered the statutory provisions as a grant of plenary power to a state agency to bind the state to any matters which might be included in contractual form. The Court reasoned:

> By contracting with appellants to be bound by all federal laws applicable to the Medicaid Program, the state has *expressly waived* its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws. (At 1363). [Emphasis supplied].

The opinion of the Circuit Court, citing *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), observed:

> While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, *Edelman,* supra, . . . the "overwhelming implication" . . . of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity . . . . (At 1363).

In *Edelman v. Jordan, supra,* this Court held:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." [Citation omitted].
>
> We see no reason to retreat from the Court's statement in *Great Northern Insurance Co. v. Reed,* 322 U.S. at 54, 88 L.ed. 1121 (footnote omitted):
>
> > [W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found. (At 673).

Amici Curiae submit that the provider contract authorized by state statute for purposes of administering the Medicaid Program, even when a state submits itself to suit in its own courts for limited purposes, is insufficient as a matter of law to constitute a waiver of a state's constitutional immunity to suit in federal court. To hold otherwise would sanction waiver of a constitutionally protected right by inadvertence of an individual who drafts a service contract. Moreover, the statement in the Florida DHRS provider contract does nothing more than reiterate what everyone knows to be the law, i.e., that once a state has elected to participate in a joint state-federal Medicaid Program, it must comply with the federal law and regulations so long as it continues to receive federal funding. Further, the Fifth Circuit Court of Appeals appears to hold that the fact that an agency of a state may agree to abide by federal law requires a federal forum to vindicate those contractual obligations. The Court stated:

> A contrary holding in the circumstances of this case, where appellants Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result.

Edelman v. Jordan, supra, requires that waiver of a state's Eleventh Amendment Immunity can be established only when the state through its legislature "expressly abrogates its constitutional immunity" or when the "overwhelming implications" from the text of the statute "leave no room for any other reasonable construction." The implications from the text of the Florida statute suggest that Florida DHRS could contract only to the extent of administering the programs it is charged with; that the administration of those programs, including Medicaid, does not necessitate the waiver of Florida's Eleventh Amendment rights; and that Florida waived its immunity to suit in state court, but not necessarily to suit in federal court where a plaintiff may obtain attorney fees under several federal statutes.

CONCLUSION

Amici Curiae contend that Fifth Circuit Court of Appeals was patently erroneous in its finding that Florida had waived its Eleventh Amendment Immunity based on the implications to be drawn from the evidence before it. The implications are neither overwhelming nor so clear as to foreclose other reasonable constructions of the statute and contracts. Furthermore, only the legislatures of the states have authority to waive their respective constitutional immunities to suit in federal court. With respect to the Medicaid Program, allowance of retroactive relief in the form of damages or reimbursement would serve neither

the interests of the public nor further the intent of Congress in enacting the Medical Assistance Act.

Accordingly, Amici Curiae, respectfully suggests the State of Florida's Petition for Certiorari should be granted.

Respectfully submitted,

BILL ALLAIN
Attorney General
State of Mississippi
JIM R. BRUCE, II
Special Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205
(601) 354-7130
Attorneys for Amici Curiae in Support of Petitioner

CERTIFICATE OF SERVICE

I, Jim R. Bruce, II, a Special Assistant Attorney General for the State of Mississippi, on behalf of the Amici Curiae in the above and foregoing Brief of Amici Curiae in Support of Petitioner, do hereby certify that I have this day mailed via United States Parcel Service, first-class postage prepaid, a true and correct copy of the aforementioned Brief of Amici Curiae in Support of Petitioner to the following attorneys for Petitioners and Respondents:

Elliott Shaw, Esquire
Suite 611
New World Tower
100 N. Biscayne Blvd.
Miami, Florida 33132

A. Thomas Mihok, Esquire
5458 Woodcrest Drive, North
Orlando, Florida 32807

The Solicitor General
Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D. C. 20530

M. Stephen Turner
Culpepper, Beatty & Turner
Post Office Box 10261
600 Lewis State Bank Bldg.
Tallahassee, Florida 32302

This, the 31st day of October, 1980.

JIM R. BRUCE, II